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ABSTRACT

A collection of essays on free speech and communication is contained in this book. The essays include "From Fairness to Access and Back Again: Some Dimensions of Free Expression in Broadcasting"; "Local Option on the First Amendment?"; "A Look at the Fire Symbol Before and After May 4, 1970"; "Freedom to Teach, to Learn, and to Speak: Rhetorical Considerations"; "Julian Bond: A Case Study in a Legislator's Freedom of Speech"; "Philosophical Assumptions Underlying Plato's Theory of Freedom of Speech: A Comparison with the Theory of Democratic Individualism"; "The Watergate Scandal and the Mass Media: The Early Phases"; "On Citizenship and Technocracy"; "The Supreme Court and the First Amendment: 1973-1974"; and "Freedom of Speech Bibliography: July 1973-June 1974." (TS)

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ADVISORY EDITORS

FROM "FAIRNESS" TO "ACCESS" AND BACK AGAIN: SOME DIMENSIONS OF FREE EXPRESSION IN BROADCASTING

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Within the last five years the United States Supreme Court has decided two significant cases involving freedom of expression and the broadcast mass media. In its unanimous 1969 Red Lion decision the Court held the Federal Communications Commission's "Fairness Doctrine" and rules based on it to be constitutional.[1] In the 1973 CBS v. DNC case, a divided Court held it was constitutionally permissible for broadcasters to ban editorial advertising with FCC acquiescence.[2] It is against the backdrop of these two decisions that the National Broadcasting Company is contesting an FCC order to comply with the Fairness Doctrine in connection with a network documentary, "Pensions: The Broken Promise."[3] In the light of the prior judgments the High Court will soon decide whether a Florida "right of reply" statute is constitutional,[4] and the FCC will conclude its lengthy examination of several aspects of the 25 year old Fairness Doctrine.[5]

In order to understand more fully the meaning of Red Lion and CBS v. DNC one must first review the evolution of the Fairness Doctrine itself. In 1927 Congress passed the first law to regulate broadcasting effectively. The Radio Act of 1927 established "public interest, convenience, or necessity" as the standard to be met by successful applicants for broadcast licenses. The Act also required that equal treatment be accorded political candidates. Although government censorship of radio communication was prohibited by law, the Federal Radio Commission had to concern itself with the broad contours of broadcast programming to the extent necessary to meet its administrative obligations under the public interest standard of the Act. In 1929 the FRC erected the framework for what was to become the Fairness Doctrine in this statement of its concept of what the public interest entailed:

> Broadcasting stations are licensed to serve the public and not for the purpose of furthering the private or selfish interests of individuals or groups of individuals. The standard of public interest, convenience, or necessity means nothing if it does not mean this. . . . In so far as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views, and the commission believes that principle applies not only to addresses by political candidates but to all discussions of issues of importance to the public. . . .[6]

The broadcasting provisions of the Radio Act remained substantially intact when they were re-enacted as Title III of the Communications Act of 1934. The FRC's successor agency, the Federal Communications Commission, gradually spelled out the relationship between the public interest and the "discussion of public questions." In the 1930's some radio stations editorialized over the air. In a 1941 decision the FCC suddenly appeared to rule editorials off the air, using this rationale:

> . . . Under the American system of broadcasting it is clear that responsibility for the conduct of a broadcast station must rest initially with the broadcaster. It is equally clear that with the limitations in frequencies inherent in the nature of radio, the public interest can never be served by a dedication of any broadcast facility to the support of his own partisan ends. Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.[7]

This became known as the FCC's "Mayflower Doctrine." Had the decision been appealed at the time there is considerable doubt that it would have been declared constitutional or consistent with the anti-censorship provision of Section 326 of the Communications Act. However, it was not contested, and broadcasters refrained from editorializing, although they were still able to give voice to partisan views through the mouths of their news commentators.

In 1947 the FCC initiated an inquiry into the broadcasting of controversy and licensee editorials. Two years later it issued its report entitled In the Matter of Editorializing by Broadcast Licensees,[8] popularly known as the Fairness Doctrine. It stands today as the official Commission policy regarding the airing of public questions. Through the haze of its bureaucratic language the Fairness Doctrine says three things. First, the broadcaster has an affirmative obligation to identify and treat controversial issues of public importance. Second, it is the right and responsibility of the broadcaster to determine the most appropriate manner of treating such issues--whether by interviews, documentaries, discussions, or even editorials. Third, when treating controversial issues of public importance the licensee must provide "reasonable opportunity" (in contrast to "equal time") for opposing views to be aired; in other words, the broadcaster must be "fair."

Through the 1950's and '60's increasing numbers of radio and television stations editorialized on a more or less regular basis. The FCC built a considerable body of case law that served to interpret and clarify the Fairness Doctrine's application in differing contexts.[9] In a 1963 public notice the Commission required that in the event of a

personal attack broadcast as part of controversial programming, the licensee must provide a copy of the attack to the person or group affected and also provide an opportunity for the person or group to reply to the attack over the station. In the same notice the FCC made provisions for responses to editorial attacks or endorsements of political candidates.[10] In 1967 personal attacks and political editorials became the subjects of official FCC rules, thereby adding more precision to the earlier guidelines and limiting the freedom of broadcasters to handle personal attacks and political editorials in their own idiosyncratic manner.[11]

The Red Lion case arose from two legal attacks on the constitutionality of the Fairness Doctrine. The first involved radio station WGCB in Red Lion, Pennsylvania. In 1964 the station had broadcast a program in which the Reverend Billy James Hargis attacked Fred J. Cook, an author. Cook asked for free time to reply on WGCB. The station refused. The FCC, acting on Cook's complaint, directed WGCB to make available its facilities for Cook's reply, even if sponsorship for the response was unavailable. The station again refused and appealed to the Court of Appeals for the District of Columbia, which, in 1967, upheld the FCC,[12] whereupon WGCB pursued its path of last legal recourse by petitioning the Supreme Court for certiorari.

The second assault involved the rules issued by the Commission in 1967. They were appealed by the Radio Television News Directors Association (RTNDA) and others before the Chicago Circuit Court of Appeals which held the rules to be unconstitutional in 1968.[13] The FCC appealed this decision to the Supreme Court, which consolidated its consideration of the two divergent cases now before it.

Justice Byron White wrote the Court's 7-0 decision. The FCC's policy and rules were upheld, and the broadcasters' cries of "abridgment of free speech" were to no avail. The Court's opinion conceded that "broadcasting is clearly a medium affected by a First Amendment interest,"[14] but emphasized the scarcity of radio frequencies that justifies application of different First Amendment standards to broadcasting:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. . . .[15]

With respect to the relationship between the broadcaster and the audience in the context of the First Amendment, the Court said:

> . . . as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.
>
> This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in 6, 326, which forbids FCC interference with 'the right of free speech by means of radio communication.' Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.[16]

These ringing words were construed as more than mere affirmation of the Fairness Doctrine on constitutional grounds. The Court's opinion provided encouragement to those who had developed a "right of access" oriented view of the First Amendment applicable to electronic and print media alike.[17] Red Lion established that, at least in the broadcast field, government may (and perhaps should) regulate so as to encourage attainment of First Amendment objectives, even if such regulation curtails the licensee's freedom to use a broadcast station as his own personal soapbox while denying access to views of a contrary nature. Thus, while government is forbidden to abridge free expression, it is not prohibited from setting conditions designed to enhance free expression. It would seem that the First Amendment erects no absolute barrier to government establishment of regulations that enlarge the flow of ideas via radio and television. This is a First Amendment stance quite different from that regarding religion, government establishment of which is clearly proscribed.

The style and substance of Red Lion were heady stuff to several noncommercial organizations who were denied access to broadcast facilities soon after the Supreme Court decision was issued. One such group, the Democratic National Committee (DNC), had tried without success to purchase thirty minutes of prime time to discuss public issues and solicit contributions on the Columbia Broadcasting System network in March, 1970. Because DNC was planning extensive purchases of time for programs and spot announcements on networks and individual stations, it sought from the FCC a declaratory ruling that "'a broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues.'"[18] As phrased by the Commission, "what is involved in the DNC request is a question whether there is a right of access to broadcast facilities by 'responsible entities' over and beyond the fairness doctrine right of the public to be informed."[19] The FCC declined to issue the desired declaratory ruling since viewed the question of access to the broadcast media as an issue-oriented rather than an individual-oriented right.[20] The Commission ruled that the Fairness Doctrine provided sufficient protection for issues' right of access. (The right of a political party to solicit funds through the purchase of spot advertising time, even during periods other than election campaigns, was upheld, albeit ambiguously.[21])

Another organization emboldened by the Red Lion decision was the Business Executives' Move for Vietnam Peace (BEM), a group opposed to aspects of American military polity, whose request to purchase time for one-minute announcements espousing its views was denied by WTOP (an all-news radio station located in Washington, D.C.) the very month the Red Lion decision was handed down. BEM approached the station on two subsequent occasions, but WTOP repeatedly declined to sell time to BEM, stating that it had a "long established policy of refusing to sell spot announcement time to individuals or groups to set forth views on controversial issues."[22] BEM complained to the FCC, requesting the Commission to order WTOP to present the editorial advertisements on either a free or paid basis. Because BEM failed to demonstrate that WTOP's coverage of the Vietnamese war issue was not in compliance with the Fairness Doctrine, the FCC denied the request.

Both DNC and BEM appealed to the District of Columbia Court of Appeals, where the common issue became "whether a broadcast licensee may, as a general policy, refuse to sell any of its advertising time to groups or individuals wishing to speak out on controversial public issues." In 1971, Judge J. Skelly Wright, speaking for the majority of a divided court, declared:

> We hold specifically that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted. We do not hold, however, that the planned announcement of the petitioners--or, for that matter, any other particular applicant for air time--

must necessarily be accepted by broadcast licensees. Rather, we confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many 'editorial advertisements' will be put on the air.[23]

The court based its reversal and remand to the Commission on the constitutionally impermissible "state action" involved in the FCC-sanctioned ban of editorial advertising by licensees, as well as the exclusion's unconstitutional discrimination favoring uncontroversial commercial advertising. The decision was cavalier in its meager treatment of the contention of broadcasters and the FCC that a judicial mandate to remove the ban would render broadcasters common carriers, a result contravening Section 3(h) of the Communications Act.[24] In retrospect, this was the opinion's most fatal flaw.

On May 29, 1973, the Supreme Court decided by a vote of 7 to 2 to reverse the Court of Appeals and uphold the FCC.[25] In contrast with Red Lion, CBS v. DNC finds the High Court confusingly divided on the issues; six separate opinions were promulgated. Justice Brennan, joined by Justice Marshall, dissented and expressed views essentially similar to those of the lower court majority.[26] Justice Douglas concurred in the Court's judgment, but on a different basis than Chief Justice Burger's majority opinion; according to Douglas, "the First Amendment puts beyond the reach of government federal regulation of news agencies save only business or financial practices which do not involve First Amendment rights."[27] Hence, in Douglas' view, the right of broadcasters to program as they please is absolute.[28]

Only three justices reversed the Court of Appeals on "state action" grounds. A clear majority of five (Burger, Blackmun, Powell, Rehnquist, and White) joined in the holding that regardless of the extent to which government action is involved and the First Amendment is embodied in the Communications Act, the FCC was justified in concluding that the public interest does not require broadcasters to accept any editorial advertising.[29] In balancing the public interest considerations of informing the public by protecting broadcaster control of content or by diminishing broadcaster control through a federal mandate to provide a limited right of access to editorial advertising, the Court agreed with the Commission that broadcasters should "determine what issues are to be discussed by whom, and when."[30]

Six justices held a right of access to be precluded by Congress' refusal to apply common carrier regulation to broadcasting, as well as congressional approval of the Fairness Doctrine.[31] They subscribed to the view that "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations. Only when the interests of the public are found to

outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the /Communications/ Act."[32]

To be sure, CBS v. DNC has neither the unanimity nor the clarity of Red Lion. But the 1973 decision does serve to reaffirm the Court's view of the Fairness Doctrine as expressed four years earlier. It also sets a limit on the degree to which the judiciary may extend public access to broadcast facilities in contravention of FCC public interest findings. Even though the justices refused to uphold the appellate court's mandate that the FCC carve out a limited right of broadcast access for editorial advertising, the majority left this hope for those with access to grind: "Conceivably at some future date Congress or the Commission--or the broadcasters--may devise some kind of limited right of access that is both practicable and desirable."[33]

What is becoming increasingly clear is that the tension between First Amendment principles of free expression and the instruments of modern mass communication continues to build. Demands for access will persist. There will be no silencing of the view that the Constitution should treat print and electronic news media more evenhandedly, and no curtailment of debate on the dual alternatives that arise from this contention. There will be those who assert that the public will be best informed through a few authoritative voices channeled by a limited number of media outlets to audiences counted in the multiple tens of millions. Others will seek to serve the ends of the First Amendment through an enlargement of mass communication channels so explosive that the resultant fragmentation creates myriad audiences, each one much closer in size to the audience for a telephone call than that viewing a network broadcast. Some will urge that only government can check the unbridled power of the media. Others will argue that even if control over the major means of public communication is concentrated in relatively few hands, the threat of government control is far more to be feared and avoided.

Even though it was fashioned before the rise of the mass media, the First Amendment remains as the marvelously supple instrument provided by the founding fathers to guide us on our way. It bestows on the Supreme Court the flexibility to ratify an FCC doctrine placing on broadcasters the responsibility of fairly presenting opposing views of controversial public issues on the one hand, and, on the other, to overturn a lower court's attempt to spell out that responsibility with such specificity that the responsibility itself is threatened by excessive government vigilance. The broad holding of Red Lion is of greater precedential significance, but CBS v. DNC sets useful boundaries on the interpretation that may reasonably be given to the former decision. The long view is that there are many missteps along the path of free expression and, indeed, we may never be sure of our destination.

FOOTNOTES

[1]Red Lion Broadcasting Co., Inc., et al. v. Federal Communications Commission et al., 395 U.S. 367 (1969).

[2]Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 93 Sup. Ct. 2080 (1973).

[3]Les Brown, "N.B.C. Sues F.C.C. on Fairness Issue," New York Times, (December 21, 1973), 70.

[4]Warren Weaver, Jr., "High Court to Rule on Space to Reply to Newspapers," New York Times, (January 15, 1974), 13.
On June 25, 1974, while this article was in press, the Supreme Court unanimously decided that the statute was unconstitutional on First Amendment grounds. See case no. 73-797, Miami Herald Publishing Co. v. Tornillo.

[5]Notice of Inquiry in the Matter of the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 30 F.C.C. 2d 26 (1971).
On July 12, 1974, while this article was in press, the FCC terminated its inquiry with the release of its "Fairness Report," FCC 74-702.

[6]In the Matter of the Application of Great Lakes Broadcasting Co., FRC Docket No. 4900, 3 FRC Ann. Rep. 32-33 (1929).

[7]In the Matter of the Mayflower Broadcasting Corporation and the Yankee Network, Inc. (WAAB), 8 F.C.C. 333, 339-340 (1941).

[8]13 F.C.C. 1246 (1949).

[9]These rulings are summarized in a question-answer format in Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964), commonly known as the "Fairness Primer."

[10]Broadcast Licensees Advised Concerning Stations' Responsibilities Under the Fairness Doctrine as to Controversial Iasue Programming, FCC 63-734, Public Notice of July 26, 1963.

[11]47 C.F.R. 73.123, 73.300, 73.598, and 73.679, applying to AM radio, FM radio, noncommercial educational FM radio, and TV stations, respectively.

[12]Red Lion Broadcasting Co., Inc., et al. v. Federal Communications Commission, 381 F.2d 908 (D.C. Cir. 1967).

[13]Radio Television News Directors Association et al. v. United States and Federal Communications Commission, 400 F.2d 1002 (7th Cir. 1968).

[14]395 U.S. 367, 386.

[15]Ibid., 388.

[16]Ibid., 389-390.

[17]The leading article in the field is Jerome A. Barron, "Access to the Press--A New First Amendment Right," Harvard Law Review, LXXX (1967), 1641-1678. Barron's assessment of Red Lion is found in his recent book, Freedom of the Press for Whom? (Bloomington: Indiana University Press, 1973), especially 137-149.

[18]In Re Democratic National Committee Request for Declaratory Ruling Concerning Access to Time on Broadcast Stations, 25 F.C.C.2d 216 (1970).

[19]Ibid., 223.

[20]Ibid., 226.

[21]Ibid., 228-230.

[22]In Re Complaint by Business Executives' Move for Vietnam Peace Concerning Fairness Doctrine Re Station WTOP, 25 F.C.C.2d 242 (1970).

[23]Business Executives' Move for Vietnam Peace and Democratic National Committee v. Federal Communications Commission, 450 F.2d 642, 646 (D.C. Cir. 1971).

[24]Section 3(h) reads, in pertinent part, ". . . a person engaged in radio broadcasting shall not . . . be deemed a common carrier." The court's only reference to this is found in footnote 52 of its decision, Ibid., 662-663, where the FCC's concern is shunted aside with the words, "That, of course, is absolutely incorrect" and no supportive reasoning.

[25]412 U.S. 94, 93 Sup. Ct. 2080.

[26]93 Sup. Ct., 2120-2138.

[27]Ibid., 2112.

[28]Justice Douglas, who did not participate in the Red Lion decision, makes it clear here that he would not have supported it: "The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or benevolent ends." Ibid.

[29]As the Court said, "we are guided by the 'venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . .'" (93 Sup. Ct., 2096, citing 395 U.S., 381).

This raises the possibility that if the FCC had decided in favor of DNC and BEM, and the Supreme Court had heard appeals by CBS and WTOP, the Court (excepting Justice Douglas) would have upheld the Commission. It may be disturbing that important First Amendment issues are resolved by the Supreme Court on the basis of such procedural aspects as whether an administrative agency has reasonably determined a contested matter to be in the public interest. There is no clear answer for those who ask whether the First Amendment or the public interest is the more lofty goal.

[30]93 Sup. Ct., 2100.

[31]Ibid., 2087-2092.

[32]Ibid., 2090.

[33]Ibid., 2100. The FCC's "Fairness Report," supra n. 5, specifically rejects "government-dictated access" (para. 78), but expresses willingness to reassess the Fairness Doctrine if subsequent developments "indicate that the doctrine is inadequate . . ." (para. 83).

LOCAL OPTION ON THE FIRST AMENDMENT?

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In 1971 Wisconsin Supreme Court Justice Wilkie wrote in a concurring opinion in a Wisconsin obscenity case, "The first amendment under the Federal Constitution is involved. This court is bound by every federal constitutional provision when applicable as here, to the states. We are, therefore, obliged to apply federal standards on the question of obscenity just as we would in matters of civil rights, search and seizure and jury trial."[1] In 1973, however, the U.S. Supreme Court ruled in Miller v. California that the community standards used to determine whether the average person would find that the material appeals to the prurient interest need not come from a "national community." Chief Justice Burger specifically rejected a requirement of national uniformity; "Pelple in different states vary in their tastes and attitudes and this diversity is not to be strangled by the absolutism of imposed uniformity." He said that a jury attempting to determine whether certain materials are obscene as a matter of fact is not required to consider "hypothetical and unascertainable 'national standards.'"[2] In this essay I shall explore the idea of local option versus national standards in an attempt to determine what will be meant by "community standards" and what effect those community standards will have on freedom of speech.

What do community standards mean and how will they be applied? The first problem is to determine how the federal courts are to apply the new rulings to the federal obscenity statutes. United States Circuit Judge Harold Leventhal asked, "What community is to be used in making this application to federal legislation? Does not the principle that federal legislation is to be given a uniform construction throughout the land require that the federal judge or jury determine a federal obscenity case by reference to a national standard on what appeals to prurient interest or what is patently offensive?"[3] Judge Leventhal suggests that perhaps the proper construction of federal laws is to prohibit only those items as obscene that could not be vindicated in any substantial community market.[4] Thus, materials that would be accepted in California or New York could not be a subject of federal prohibition anywhere else. If this practice were followed, it would mean a de facto rejection of local standards in the federal courts. An even more obvious rejection of the Supreme Court stand by the federal courts occurred in February of 1974 when the First U.S. Circuit Court of Appeals ruled that national standards should be used in

obscenity cases in federal courts.[5] Chief Judge Frank M. Coffin said that it might be more gracious to follow the Supreme Court and apply local standards, but that his circuit would not switch unless ordered to do so.[6] There may be little change, therefore, in the attitude of the federal courts.

How will "community standards" be interpreted in relation to state obscenity laws? Is a community the state as a whole or is it a city or an even smaller unit? Most of the references in Miller are to state offenses, but there are also references to local tastes. Judge Leventhal has predicted that the Supreme Court will permit a state law to use a "local," municipal or county standard. He states that this would be consistent with the ruling in Paris Adult Theatre,[8] the second of the 1973 obscenity decisions, that the prosecution need not present expert affirmative evidence of obscenity. Leventhal adds that a jury could not reasonably be expected to know the state standards without expert help, but might be competent to judge local standards.[9] Thus, for practical purposes, community standards may vary from county to county.

What will be the effect of such local standards? After the decisions were handed down, many writers sounded the alarm. Justice William O. Douglas writing also on behalf of Justices William J. Brennan, Thurgood Marshall and Potter Steward said, "Every author, every bookseller, every movie exhibitor and, perhaps, every librarian is now at the mercy of the local police force's conception of what appeals to the 'prurient interest' or is 'patently offensive'. . . . The standard can vary from town to town and day to day in unpredictable fashion."[10] Former Attorney General Ramsey Clark called the idea of leaving pornography decisions to individual communities a "cop out." "It is a failure of the court to face the issue and terribly mischievous in that it will lead to more fear, more human suffering and ultimately more pornography."[11] The Association of American Publishers stated that the decision constitutes a continuing threat to freedom of speech under the First Amendment of the Constitution, and inconsistent enforcement breeds public disrespect for the legal process.[12] The Attorney General of the State of Michigan said, "This really sets us back in the dark ages. Now prosecuting attorneys in every county and state will be grandstanding and every jury in every little community will have a crack at each new book, play and movie."[13]

Were the fears of these writers justified? Some of them certainly were. The New York Times on July 2, 1973, reported planned crackdowns in Massachusetts, California, Arizona, Ohio, New York, New Jersey, Pennsylvania, Illinois and Georgia.[14] The Milwaukee Journal reported that the old censorship review board might be reactivated since it would be a logical group to determine community standards,[15] and one city attorney told all theaters in his city to stop showing X-rated films.[16] In July of 1973 the Georgia Supreme Court upheld a trial jury's finding that the movie Carnal Knowledge is obscene according to local community standards.[17] In Longwood, Florida, merchants were

told in August of 1973 that anyone violating a ban on selling such magazines as Playboy, Oui, and Penthouse would be charged with a misdemeanor. Police Chief Wesley Dowell said, "I am here to uphold the standards of the community. As their police chief, the people of Longwood have entrusted me to decide what is obscene."[18] In Johnston, Rhode Island, the Town Council established the first movie and publication review board in Rhode Island. The panel has the authority to inspect and pass upon "all entertainment and/or publications offered to the public by licensed establishments in Johnston."[19]

The Devil in Miss Jones was found not to be obscene in Manhattan, but was ordered seized as obscene by a judge in the Bronx.[20] In Las Cruces, New Mexico, Judge Garnett Burkes ruled that an adult bookstore and film center cannot display "any movies or periodicals which portray homosexuality, including lesbianism, masochism, sadism, or which portray violent crimes without punishment therefor."[21]

These actions and others like them should not have surprised anyone. There is ample historical evidence that many Americans, perhaps the majority, do not really believe in an open "market place of ideas."[22] Several years ago a year-long survey conducted by the Carnegie Corporation found that over two-thirds of the people interviewed found that censorship of some materials was proper.[23] A Milwaukee attorney in an obscenity case found only one juror out of twenty-four who said that the government had no business censoring materials for adults,[24] and even surveys of urban university students have revealed that a large number of them think some things should be censored. The President's Commission on Pornography and Obscenity reported that while most people think they could safely be allowed to read or see anything, more than half thought that others could not.[25]

Obviously, in some communities standards are more restrictive than in others. The musical Hair was determined to be obscene in Chattanooga, Tennessee.[24] The American Library Association reports that in many communities Catcher in the Rye is still removed from school and public libraries.[27] In Channelview, Texas, a copy of Newsweek was ordered removed from school libraries[28] and the Buffalo schools objected to The Inner City Mother Goose.[29] A Wisconsin printer was run out of business for printing an underground newspaper.[30] It seems likely that in many communities juries will find much that offends local standards. There may be grounds to fear as did the editors of The New York Times that "in the long run it will make every local community and every state the arbiter of acceptability, thereby adjusting all sex-related literary, artistic and entertainment production to the lowest common denominator of toleration. Police-court morality will have a heyday."[31]

We might have learned from other freedom of speech conflicts in the past that local standards mean that some expression will be repressed, and that there is, then, no equal justice under law. A look at the actions of the states and localities in relation to the right of assembly may illustrate the point.

The right of assembly was considered to be an ancient right which existed prior to the U.S. Constitution. In 1875, Supreme Court Justice White wrote, "The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the states. The power for that purpose was originally placed there, and it has never been surrendered to the United States."[32] States and cities viewed their obligation to this right in different ways. Some prohibited parades and speeches entirely on public property; some granted it absolutely; and some left the matter up to the discretion of public officials. Regulations restricting or prohibiting the use of public places as a public forum were repeatedly challenged by early militant groups such as the Salvation Army. These legal challenges were resolved in different ways. One line of decisions was most often concerned with parades, and rules that the right to hold parades and processions on public streets was such a well-established right that it could not be totally prohibited, nor could it be vested in the discretionary power of a city official.[33] That type of decision generally occurred in the Midwest. The second line of decisions held that cities could prohibit such activities on public ground entirely, as well as enforce a discretionary permit system. These cases involved both parades and speeches and happened most often in New England.[34] In one city it was considered perfectly appropriate when a chief of police turned a firehose on a speaker and washed him from the platform,[35] while in another, the court thought that it was more important to have parades and speeches than traffic on city streets.[36] One judge stated that if people chose to live in a city, they had to expect noise and confusion and, therefore, could not justifiably complain about speeches and parades.[37] Those were the standards of an urban area.

In 1897, the Supreme Court refused to take this matter out of local hands and quoted Oliver Wendell Holmes, "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."[38] In other words, the city had control and could impose its own local standards. It was not until 1939 that the Supreme Court again considered this issue and decided to take the matter out of local control. Justice Roberts' opinion was not an opinion of the Court, but it did express what has since been most often the prevailing view when he wrote "whereever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind been used for purposes of assembly, communicating thoughts

between citizens and discussing public questions."[39] Most would agree that this attempt to achieve a national standard has been preferable to the old system which allowed certain cities to totally forbid speaking in public places.

There are many other historical and current examples in and out of the free speech field. State laws on picketing differed and those on flag desecration are still contradictory. State sedition, voting and segregation laws have imposed state standards which the nation has found totally unacceptable. Many people had thought that the First and Fourteenth Amendments together prohibited local decisions concerning the breadth of First Amendment guarantees. Some thought that this had been clear by the Gitlow decision in 1925. One of these was the late Zechariah Chafee. He entitled Chapter Five of Free Speech in the United States, "Victory out of Defeat." In that chapter Professor Chafee discussed the 1925 case of Gitlow v. New York.[40] The decision in that case extended the scope of the First Amendment to include state as well as federal action. Prior to that time the First Amendment was only thought to protect individuals from infringement by the federal congress; each state legislature could act as it pleased and need worry only about its own state supreme court. In the Gitlow decision the United States Supreme Court agreed unanimously that freedom of speech and of the press were among the fundamental personal rights and liberties protected from impairment by the states. Chafee commented, "Now that the Court's power to protect liberty of speech under the Fourteenth Amendment had been decisively established, that power was bound to be exercised sooner or later to reverse convictions. And so a more liberal Court could prevent the United States from becoming a checkerboard nation, with ultra-conservative states into which moderately radical Americans would come at peril of imprisonment for sedition."[41]

Most other writers on the First Amendment have also hailed this decision as a triumph for freedom of speech and for "equal justice under law." The celebration, however, may have been fifty years too early. A conservative Court may have turned the tide back to a checkerboard period where Catcher in the Rye, Lady Chatterly's Lover as well as Deep Throat may be in peril of censorship--and where justice may no longer be equal under law.

FOOTNOTES

[1]Court v. State, 51 Wis. 2d. 683 (1971).

[2]Miller v. California, 413 U.S. (1973).

[3]Harold Leventhal, "The 1973 Round of Obscenity-Pornography Decisions," American Bar Association Journal, (November, 1973), 1262.

[4]Ibid.

[5]The Milwaukee Journal, (February 4, 1974), 5.

[6]Ibid.

[7]Leventhal, 1262.

[8]Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973).

[9]Leventhal, 1262.

[10]The Milwaukee Sentinel, (October 24, 1973), 3.

[11]The New York Times, (October 28, 1973), 54.

[12]The Milwaukee Journal, (September 27, 1973), 5.

[13]The New York Times, (June 24, 1973), 10.

[14]The New York Times, (July 2, 1973), 13.

[15]The Milwaukee Journal, (June 23, 1973), 1.

[16]The New York Times, (June 23, 1973), 14.

[17]Newsletter on Intellectual Freedom, (September, 1973), 97.

[18]Newsletter on Intellectual Freedom, (November, 1973), 137.

[19]Ibid.

[20]The New York Times, (August 5, 1973), 14.

[21]Albuquerque Journal, (November 7, 1973), 1.

[22]Ruth McGaffey, "A Critical Look at the Marketplace of Ideas," Speech Teacher, XXI (1972), 116-120.

[23]The Milwaukee Journal, (December 11, 1970), 12.

[24]Interview with John Valenti, January, 1971.

[25]Technical Report of the Commission on Obscenity and Pornography, Vol. 6, 81-114.

[26]The Milwaukee Journal, (May 31, 1973), 14.

[27]Newsletter on Intellectual Freedom, (May, 1973), 26.

[28]The Washington Post, (December 2, 1972).

[29]The New York Times, (October 4, 1972).

[30]The Milwaukee Journal, (May 10, 1970).

[31]The New York Times, (June 25, 1973), 32.

[32]United States v. Cruikshank, 92 U.S. 542, 551 (1875).

[33]Frazee's Case, 30 N.W. 72 (1886); Anderson v. City of Wellington, 19 Pac. 719 (1888); City of Chicago v. Trotter, 26 N.E. 359 (1891); In re Garrabad, 54 N.W. 1104 (1893); In re Gribben, 47 Pac. 1074 (1897).

[34]Commonwealth v. Davis, 4 N.E. 577 (1886); State v. White, 5 Atl. 828 (1886); Commonwealth v. McCafferty, 14 N.E. 451 (1888); Commonwealth v. Plaisted, 19 N.E. 224 (1889); Commonwealth v. Abraham, 30 N.E. 79 (1892).

[35]Harwood v. Trembley, 116 Atl. 430 (1922).

[36]Anderson v. Tedford, 85 So. 673 (1920).

[37]Anderson v. City of Wellington, 19 Pac. 719 (1888).

[38]Davis v. Massachusetts, 167 U.S. 43 (1897).

[39]Hague v. C.I.O., 307 U.S. 496 (1939).

[40]Zechariah Chafee, Free Speech in the United States (New York: Atheneum, 1969), 318.

[41]Ibid.

A LOOK AT THE FIRE SYMBOL BEFORE AND AFTER MAY 4, 1970

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Fire has earned its place as both a real threat and a major metaphor in the history of Supreme Court opinions. In 1919 Justice Holmes articulated what has come to be the unchallengeable limit to free speech when he reasoned that even "The most stringent protection to free speech would not protect a man falsely shouting fire in a theater and causing a panic."[1] With vivid reference to bodies trampled in panic as a result of irresponsible speech, the High Court established a broad political precedent for the clear and present danger test: Any message whether written or spoken which might result in damage to public or private property or life could not share First Amendment guarantees.

Six years later Holmes referred to the inflammatory potential of the rhetor when he stated, "Eloquence may set fire to reason."[2] In this opinion he was careful to say that this did not mean that politically radical speech should be banned, even "beliefs expressed by those who would radically change our government."[3] The Supreme Court, as well as lower courts, has increasingly come to reckon with fire used as a symbol. Examples include the draft card burner,[4] flag burner,[5] and cross burner.[6]

What was the significance of "fire" and threats of fire in events leading up to and following May 4, 1970? The volley fired by Ohio National Guardsmen killing four and wounding nine Kent students that Monday gives cause to examine incidents surrounding that tragedy. Many investigations of that tragedy have preceded this one,[7] but none to date has focused upon the relationship of fire and the rhetorical threat of fire to events surrounding May 4.

Art and Arson

Prior to the late sixties student demonstrations climaxed by bonfires and occasional arson were foreign to the quiet campus of Kent State University. An occasional "panty raid" or mud-fight was the most excitement that ever threatened Kent, Ohio. It was, however, the 1968-69 school year that brought long hair, grubby attire, and new radicalism.

During the Winter term discontent grew among a group of Art students over the condition of the building in which their art classes were scheduled.[8] The building, a World War II vintage Army barracks situated at the west side of the Commons and remodeled to serve as a temporary classroom building, had more than served its time in the opinion of those enrolled in art classes. Finding the building terribly hot in the summer, cold in the winter, and always overcrowded, frustrated students assembled on the Commons and carried picket signs to the President's home. The next day the building burned.[9] Arson was suspected, and the administration vehemently denounced the fire as a means of persuasion. The building was repaired and new facilities were promised.

As winter gave way to spring, protests by Students for a Democratic Society disrupted normal activities at Kent State, and confrontations between police and demonstrators evoked nationwide publicity as the university joined the ranks of American campuses disrupted by protest and "occupied" buildings.[10] Ironically, university workmen chose fire to remove "revolution" which had been scrawled upon a sidewalk in front of Taylor Hall on May 1, 1969.[11] Just one year later workers would remove blood stains from pavement only a few feet away.

On March 12, 1970, a group known as the Student Mobilization Committee set to map out plans for a full week of protest to be highlighted by a mass demonstration on April 15. Attempting to come up with a decisive action to accentuate the weeklong protest, a wide range of activities were considered. One suggestion entertained by the group was to burn a bank.[12] After some deliberation, that suggestion was discarded. Other uses of fire, however, were given more serious consideration.

In one such incident on April 23, Bill Arthrell, at that time a sophomore history major, announced to the press his plan to napalm a dog. On the day of the event he addressed a question to the crowd, "How many are here to stop me from napalming a dog?" Viewing a show of hands, he asked, "How many of you are prepared to use action to stop me?" Again there was a show of hands. Arthrell, responding to the will of the gathering, railed at his audience, "You have the audacity to tell us to stop napalming a dog, but you don't stop the government from using it on people." The dog was not napalmed. Campus and county police, Portage County Prosecutor Ron Kane, and a representative of the Animal Protective League had come to the campus to stop the demonstration. Prosecutor Kane commended "the responsible way in which the students (trying to stop this thing) have acted." He added that the demonstration against the napalming had changed his attitude toward Kent students from previous visits to the campus.[13]

The Long Fatal Weekend

On Thursday, April 30, 1970, President Nixon announced the American "incursion" into Cambodia. The following day two graduate history students, dismayed by the expansion of the war, christened a tongue-in-cheek organization: World Historians Opposed to Racism and Exploitation (WHORE). Their first official act was to distribute leaflets calling a noon rally on the Commons at which the Constitution was to be buried. That noon a brief statement decrying the Cambodian venture was read to the crowd of approximately 500 seated on the wooded hillside overlooking the green. In the distance stood the ROTC building.

There was a sign hanging on a nearby tree asking, "Why is the ROTC building still standing?"[14] One student interrupted the ceremony with a speech opposed to the burial, but the Constitution, torn from a sixth grade text, was interred in a shallow grave to scattered applause.

Immediately following this ceremony another student, who claimed that he won the Silver Star in Vietnam with the 101st Airborne, jumped onto the platform, discharge papers in hand. "I earned the right to burn these papers and goddamn it, I'm going to do it." The papers burned and someone from the crowd shouted "Right on! Burn, baby, burn!" A graduate student English instructor and member of the New University Conference (a leftist organization of graduate students) added to the protest, "We're not going to take bullshit lectures from bullshit profs."[15] Another campus radical, a self-proclaimed marxist, entertained the crowd by announcing that he was a Communist and by pointing out one of the campus police present on the hillside, "J. Edgar Pig. . .the woodchuck wearing the blue windbreaker, the brown slacks, and the brown shoes."[16] Shortly after one p.m. the crowd quietly dispersed.

That evening was one of the first warm spring nights, and students packed the Kent bars, only a few blocks from campus. Just before midnight members of a nonstudent motorcycle gang collected trash, built a bonfire in the middle of Water Street, "and pissed on it."[17] The crowd, some dancing in the streets, were ignited with a festive spirit. What began in happy-go-lucky spirit changed, however, when someone tried to drive through the crowd. His car was pounded and the "have a good time, brothers and sisters, the streets belong to the people, we're going to have a festival" atmosphere soon was replaced by chanting: "One, two, three, four, we don't want your fucking war!" "Fuck the pigs." "Bring the GI's home now." "Fuck Agnew." "Fuck Nixon."[18] The crowd threw rocks and bottles, breaking about fifty windows—an estimated ten to fifty thousand dollars damage—before the fire was put out and the crowd dispersed with teargas. This was much less than the

more than one hundred thousand dollars damage which occurred a few months earlier in Columbus after Ohio State's Rose Bowl victory. But the proximity of radical protest to what other wise might have been considered a spring fling polarized the community against the students. Fire was seen as the means of those who shouted for the "liberation of the streets." As a result the mayor called the National Guard and had them put on alert. He also ordered the bars closed and students restricted to campus the following night and banned the sale of firearms and gasoline in containers.[19]

The next day, Saturday, ROTC students and officers had just returned from a rifle range and were gathered near the old wooden ROTC building. A student approached the gathering and told an officer, "You'd better watch your building. It would make a pretty fire."[20] The owners of a downtown shoe store and a music store were among those who reported they were told to put an antiwar sign in their window with "Out of Cambodia" or "Get out of Vietnam" or some such message, unless they wanted their shops burned or damaged.[21]

Later that afternoon a small band of students which had gathered on the Commons paraded through the residence halls gaining numbers. A dance, which was hurriedly arranged to divert student attention from the dawn-to-dusk curfew, attracted only a handful of students. By the time the parade returned to the Commons near the ROTC building, its number had grown to more than one thousand.[22]

Some students chanted, "Ho, Ho, Ho, Chi Minh" and "We don't want your fucking war." A demonstrator unfurled an American flag, ripped it, fastened it to a stick and set it ablaze. Later James Michener described it dramatically, "a mob of 2,000 came roaring over the crest and down toward the ROTC building. . .a young man fasten[ed] an American flag to a makeshift pole and set fire to it with a lighter. It burned slowly at first, and then as the crowd cheered it burst into vigorous flame against the night sky."[23] The Scranton Commission simply said, "someone burned a miniature flag."[24]

Some demonstrators attacked a student photographer who tried to get pictures of the event.[25] The crowd was angry. After several fumbling attempts, someone ignited the old wooden ROTC building which to demonstrators symbolized the university's complicity with the war. The building began to blaze about 8:45. Although only a small number, perhaps a dozen, were actually involved in the effort to start the fire, many in the crowd cheered and some shouted "Burn, baby, burn." Several demonstrators threw stones at firemen who came to fight the blaze. Someone slashed the water hoses, and the building burned to the ground. Someone started three other fires that evening: a small shed used to store sports equipment, a pile of debris at a nearby construction site, and an information booth.[26]

The National Guard arrived in Kent at 9:15 p.m. and were met on Main Street by bands of students who had been routed from the burning ROTC building. Some of the students threw stones at the Guard as they approached the campus. Guardsmen liberally unleased teargas and with mounted bayonets dispersed students. When a group of faculty marshals wearing blue armbands attempted to identify themselves to the approaching Guard, the guardsmen knelt in a skirmish line and pointed rifles at them. The faculty marshals fled.[27]

Sunday morning Governor James Rhodes arrived in Kent. If there was evidence that students had lost their sense of reason and were bent for destruction the night before, Governor Rhodes did nothing to return the campus to rational behavior. Instead his remarks were inflammatory. He described the action as

> worse than the brown shirts and the communist element, and also the night-riders and vigilantes. They are the worst type of people that we harbor in America. And I want to say this--they are not going to be part of the county and the state of Ohio. It is no sanctuary for these people to burn buildings down of private citizens or businesses, in the community, then run into a sanctuary.[28]

The governor's fight-fire-with-fire speech was broadcast by radio to the Kent community and to the troops encamped upon the university football field.

Sunday night students congregated despite orders not to. Teargas dispersed from helicopters and unleashed by troops on the ground dispersed the students. Two were wounded by bayonets. On Monday there was a student rally in opposition to the presence of the Guard and the university's ultimatum barring all assemblies. Amidst the efforts of the Guard to disperse the crowd, one unit, fatigued and frustrated by the demonstrators, turned, knelt and fired! The Guard, incensed by bonfire rhetoric and student demonstrations, responded with massive fire-power. Four were dead and nine others wounded. The university closed.

In The Wake of Tragedy

During the remaining weeks of the spring term, the consi-erable resources of Kent State University were virtually idle. "No trespassing" signs dotted the perimeter of the quiet campus, and large police contingents parolled. Yet there was one more fire that spring at Kent.

On June 20 a vacant building on a remote corner of campus burned. No tangible evidence indicated that someone had set the fire, but the following evening Erwin Blount, President of Black United

Students, and Rudolf Perry, a fellow officer, were arrested for trespassing near the burned structure. They were frisked, handcuffed, and asked about the two gallons of motor oil and a highway flare in their car. Still under a court injunction, Kent State opened for the summer term. An air of caution hung over the campus. State patrolmen took up stations between buildings. Students moved about the campus more quietly than usual.

"Think Week" was scheduled for the beginning of the fall term.[29] It was intended that this week of discussion would provide an acceptable means for students to vent their frustrations and therefore avert further violence. A memorial service for the students slain on May 4 brought 5,000 to Memorial Gym on September 28. Speakers included Sheila Barton, winner of the 1970 Peace Speech contest; singer Phil Ochs; Ira Sandperl, leader of the California Institute for the Study of Non-Violence; the Reverend Ralph David Abernathy, Chairman of the Southern Christian Leadership Conference; Tom Grace, injured May 4; and Dean Kahler, paralyzed from the waist down.

Following the service the speakers and nearly 2,000 students held a candlelight march from the gym to Taylor Hall. During a brief ceremony at the site where the shooting had occurred flames from several burning draft cards shown above the flicker of candlelight. Tim Butz, who burned the cards and was a leader of Veterans Against the War in Vietnam, declared, "I hope that you all understand that these burning draft cards are the only flames that should engulf Kent State now. . .No more buildings must ever be burned. We have too much to lose for that. We have lost too much already."

In October, 1970 the Portage County Grand Jury report exonerated the National Guardsmen who had shot the students and indicted 25 members of the campus community, several for the ROTC burning and others for inciting the students to riot on May 4. Among the Kent 25 were the student body president and one professor who reportedly had taught his classes how to build a molotov cocktail.

Throughout that year the indictments hung heavy and served to convince many in the campus community that there was little hope for redress through the courts. The massive FBI investigation was completed and the President's commission concluded that:

> Even if the Guard had authority to prohibit a peaceful gathering--a question that is at least debatable--the decision to disperse the noon rally was a serious error. The timing and manner of the dispersal were disastrous. Many students were legitimately in the area as they went to and from class. The rally was held during the crowded noontime luncheon period. The rally was peaceful, and there was no apparent impending violence. Only when the Guard attempted to disperse the rally

did some students react violently. . .The indiscriminate firing of rifles into a crowd of students and the deaths that followed were unnecessary, unwarranted, and inexcusable.[30]

The federal investigations had concluded that the guardsmen actions "were unnecessary, unwarranted, and inexcusable," yet none of the Guard or their superiors were indicted. To adjust to this measure of injustice amidst a year of mourning and not to turn to bitter terrorist response was the challenge. In 1971 campus security was allotted a million dollar budget and an unprecedented 102 policement patrolled the campus.

Flickering Protest

On an icy day in February, 1971, fire and speech once again became interrelated at Kent.[31] A coalition of Blacks and Yippies burned a small cardboard replica of the Army barracks at the site where the ROTC building once stood, and someone in the group slashed the ropes which secured the Ohio and United States flags while others spray-painted slogans of revolution on the front of the Administration building.

Later that month Erwin Blount, then President of Black United Students, was tried for assault and battery. Allegedly Blount had kicked Bobbie Lamb, a blonde freshman, and called her a "white bitch" in a Student Senate meeting. Blount and his colleagues made "light" of the proceedings by inviting the audience to join him in celebration of his birthday. Striking a match to the candles on his cake, he invited the audience (those awaiting the hearing) to sing "Happy Birthday." Cake was then distributed to those who had gathered around him before the trial. Birthday candles, of course, were no match for a bonfire, but more than the traditional message of celebration was communicated to those in the courtroom. The message included indignation and contempt for the system.

On the first anniversary of the infamous shootings, candlelight again played a significant role in student demonstration at Kent. A candlelight vigil illuminated "blanket hill" in front of Taylor Hall and told the campus community that May 4, 1970, had not been forgotten. Candles reverently held by students over the spots where Sandy, Bill, Jeffery and Allison had fallen dead flickered to recall the anguish of rifles fired wildly into the crowd a year before.

Smoke and Ashes

After persistent protest and a year-long battle, on Monday, November 15, 1971, "Flames got to the special Portage County Grand Jury report."[32] Judges in the Cincinnati Sixth Circuit Court of Appeals upheld a legal order for the expungement. A clerk of the court executed the expungement, burning the report in a parking lot behind the courthouse.

Flames and ashes again became a form of celebration on December 8, 1971. On that day the State dropped indictments for all but three of the Kent 25. Concerning the three whose charges were not dropped, the State Attorney General ruled that "People who have been found guilty or have pleaded guilty will stand guilty."[33] One was convicted for interfering with a fireman at the burning of the ROTC building on May 2, 1970, and two other defendants pleaded guilty of first degree riot. When members of the Kent 25 learned that the remainder of the indictments had been dropped by the State, they gathered with onlookers at the site where the ROTC building had once stood, and burned their indictments in celebration.[34]

Nearly four years after May 4, 1970, the conclusion to the chronology related to the incident that day may be near. In late March 1974, the Federal Grand Jury for the investigation of events surrounding May 4 indicted eight former Ohio National Guardsmen. The guardsmen were charged with violating the civil rights of the KSU students.[35] Their trial begins October 15, 1974.[36] Following this trial, U.S. District Court Judge Young, sitting in Toledo, Ohio will hear wrongful death and damage suits resulting from the May 4 incident. The nine wounded students and parents of the four students slain on May 4, 1970, filed the suits against defendants including former Governor James Rhodes; former KSU President Robert I. White; Sylvester Del Corso, former Adjutant General of the Ohio National Guard; Robert Canterbury, former Assistant Adjutant General; and individual officers and enlisted men in the Ohio Guard.[37]

Comment

What set fire to reason at Kent? Why did National Guard troops turn and fire upon students that infamous Monday? One answer is that radical political protest came to be identified with fire by the people of Northeastern Ohio. Destruction by fire and the recurrent threat of arson by a few dissenters blinded many people to the societal concerns of the students. The Kent community, previously untouched by radicalism of any sort, believed their businesses, homes, and university to be threatened by arson. Recent destruction by arson was proof that those fears were well founded. The burning of the art building, the Arthrell napalming "hoax," the street bonfire and

smashed windows in downtown Kent had angered the community. Moreover during the weekend preceding May 4 the community witnessed the burning of draft cards, discharge papers, the Constitution, the American flag, and the ROTC building.

Those protestors who chose "fire" to symbolize the urgency of their protests and to create an imperative for immediate change became the targets of reaction rather than the agents of change. Confronting the community with fire and threats of fire, protestors alienated audiences they sought to persuade. The series of antiwar demonstrations in which the fire symbol became increasingly visible provoked state and local officials to abandon reason and call for the National Guard to restore order. By burning the ROTC building, protestors boldly pursued their "fiery" theme and thereby created a justification for the military takeover of the campus.

Tactics of arson would be seen by some analysts as skillful terrorist tactics calculated to "bring the war home" and to shut the university down.[38] It is our conclusion that the escalation of events moved, in large part, from fire symbol to fire-power to death, because the rhetorical symbol and the destructive element could not be separated. The oratory of arson had "set fire to reason" at Kent.

FOOTNOTES

[1]Schneck v. US 429 US 47 (1919).

[2]Gitlow v. New York 268 US 652 (1925).

[3]Ibid.

[4]US v. O'Brien 391 US 672 (1968).

[5]Street v. New York 394 US 576 (1967).

[6]Brandenburg v. Ohio 395 US 444 (1969).

[7]Robert M. O'Neil, J.P. Morris, and R. Mack, No Heroes, No Villians (San Francisco: Jossey-Bass, 1972). Phillip K. Tompkins and Elaine Vanden Bout Anderson, Communication Crisis at Kent State (New York: Gordon and Breach, 1971). Joe Eszterhas and Michael D. Roberts, Confrontation at Kent State: 13 Seconds (New York: College Notes and Texts, 1970). Interim Report of the Select Committee to Investigate Campus Disturbances to the 108th Ohio Legislation Assembly Pursuent to AM, SUB.S, Con. R, No. 34, October 8, 1970, 1-34. James A. Michener, Kent State: What Happened and Why (New York: Random House, 1971). Student Views Toward United States Policy in Southeast

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[8]Terry Ohlander, "200 Art Students Plan Walkout," Daily Kent Stater, LIV, No. 76 (March 6, 1969), 1.

[9]Terry Ohlander, "'Arson Probable' In Barracks Fire," Daily Kent Stater, LIV, No. 78 (March 10, 1969), 1-2.

[10]Bill Armstrong, "SDS Bumps Heads With Campus Police," Daily Kent Stater, LIV, No. 85 (April 9, 1969), 1.

[11]Caption below a picture, Daily Kent Stater, LIV, No. 99, (1969).

[12]"SMC Plans Fall Week of Protest," Daily Kent Stater, LV, No. 75 (March 12, 1970), 1.

[13]Harold Greenberg, "Crowd Rallies to Stop Napalming of Dog," Daily Kent Stater, LV, No. 91 (April 23, 1970), 1.

[14]Michener, 12-22.

[15]President's Commission, 240.

[16]Ibid.

[17]Ibid.

[18]Ibid.

[19]Ibid.

[20]Ibid., 244-45.

[21]Ibid.

[22]Michener, 137-224.

[23]Ibid.

[24]President's Commission, 248.

[25]Ibid.

[26]Ibid., 250-251.

[27]Ibid., 252.

[28]Ibid.

[29]"Abernathy: 'Get on the Case,'" Daily Kent Stater, LVI, No. 2 (September 29, 1970), 1.

[30]President's Commission, 288-289.

[31]Sue Zimmerman, "Teach-In Committee Sponsors Peace Week," Daily Kent Stater, LVI, No. 59 (February 9, 1971), 1.

[32]"Special Grand Jury Report Expunged," Daily Kent Stater, XVI, No. 28 (November 16, 1971), 1.

[33]"State Drops Indictments of Remaining Kent 25," Daily Kent Stater, XVI, No. 39 (December 8, 1971), 1.

[34]"Indictments Burn Where ROTC Stood," Daily Kent Stater, XVI (December 9, 1971), 16.

[35]Bob Downing, "KSU Death Suits Will Be Heard by Toledo Judge," Akron Beacon Journal, No. 108 (July 31, 1974), A4.

[36]"Trial of KSU Guardsmen Moved Back," Akron Beacon Journal, No. 111 (August 3, 1974), A2.

[37]Downing, A4.

[38]Michener, 135, refers to the role of "a hard core of radical activists abetted by a few real revolutionaries."

FREEDOM TO TEACH, TO LEARN, AND TO SPEAK: RHETORICAL CONSIDERATIONS

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There is in the speech communication classroom a confluence of three compelling and exciting streams of custom and common law. First are the customs and traditions of rhetoric. These mingle with and reinforce the laws emanating from the First Amendment. And both of these are augmented by the more specific rubrics of Academic Freedom--the freedom to question, to learn, and to teach.

Charles Sears Baldwin epitomized the fourfold function of Aristotle's rhetoric as being "first and foremost, to make truth prevail by presenting it effectively in the conditions of actual communication, to move; second, to advance inquiry by such methods as are open to men generally, to teach; third, to cultivate the habit of seeing both sides and analyzing sophistries and fallacies, to debate; and finally to defend oneself and one's cause."[1] The contemporary force of this view is perhaps nowhere better shown than in the essay, "Rhetorical Sensitivity and Social Interaction" by Rod Hart and Don Burks. There they reaffirm that rhetoric is instrumental, rather than simply expressive, and that major concerns in the study of speech communication include development of one's willingness to undergo the strain of adaptation to others and to their ideas, and one's ability to distinguish between all information and that information acceptable for communication.[2] Similarly, Karl Wallace, in The Prospect of Rhetoric, reminds us that "...the subjects of rhetorical discourse, because they represent problematic situations, always present alternative possibilities. Confronted with them, men must weigh and choose unless they run away from their obligation to think and act."[3]

The history of waxing and waning civilizations before and since Aristotle articulated his position can be told in terms of the degree to which this view of rhetoric as instrumental has prevailed in a society. It was the Antifederalists, fearful as they were of the concentration of power in a central government, who forced the inclusion of the First Amendment guarantees of freedom in the written law of our land. They felt that the God-given rights and freedoms needed man-affirmed protection in the courts against restriction through excessive zeal, on the one hand, and erosion through apathy on the other. Adoption

of the "Bill of Rights" protection was the price demanded for ratification of the remainder of the document. Congress and the courts have since recorded the tides of restriction and reassertion of the citizen's rights to speak, to publish, and to assemble freely as members of a civilized community.

Much more recent in our country has been any collective concern for special protection of freedom for those engaged in academic pursuits. Perhaps the pedagogues and scholars of the eighteenth and nineteenth centuries were more insulated from public pressures than they have been since 1900. Colleges and universities were "away" then, and one went "away to school." When he "came back from school" he could choose to recite some of his learning, or he could retire behind a facade by saying, "I can't explain it to you, father. You would not understand." But as the gap between scholar and citizen has narrowed--along several dimensions--the reciprocal pressures have increased. Mankind, becoming increasingly the proper study of scholars, has determined that scholars should, in their turn, be scrutinized by mankind. This "measure for measure" relationship led directly to the articulation of a special basis for freedom to speak, based not upon the intrinsic qualities of the citizen, but upon the professional qualifications of the academic. As Sidney Hook has phrased it, "Anyone has a human right to talk nonsense about anything, anywhere, any time. But...one must be professionally qualified to talk nonsense in a university."[4]

In a somewhat different vein, Hoo, describes the concept of academic freedom as "...the freedom of professionally qualified persons to inquire, discover, publish and teach the truth as they see it in the field of their competence. It is subject to no control or authority except the control or authority of the rational methods by which truths or conclusions are sought and established in these disciplines."[5] At first, as the 1915 committee of the American Association of University Professors generated their report on academic freedom, it was promulgated primarily in terms of teaching--freedom to teach, lehrfreiheit. But the very first sentence of that 1915 Declaration of Principles identifies the necessary concomitant, the freedom to learn, lehrnfreiheit.[6] It is futile to attempt to argue that freedom to teach applies only to those who are employed to teach, and freedom to learn applies only to those enrolled to learn. When one stops learning, he jeopardizes his professional qualification to teach. It is equally futile to defend academic freedom against those who challenge it on grounds that in any specific instance or case in point, the truth--the absolute and ultimate truth--was being taught. The message will not lend itself to that kind of claim. It is only the process--the method of analysis, inquiry, synthesis, interpretation, and evaluation--which will provide adequate defense when academic freedom is challenged. And it is the academic process--both the learning and the teaching--which is the community property of everyone in the classroom.

The component forces of the discipline of rhetoric, the laws surrounding the First Amendment, and the bases of academic freedom seem to me to determine attitudes and practices appropriate to the speech communication classroom. Among these must be the willingness to undergo the strain of adaptation, to expose ourselves to the results of each citizen-scholar's honest efforts to employ the methods of the rhetor, and the reciprocal willingness to be exposed to the questioning and challenging of other citizen-scholars, as they seek to develop their own rhetorical skills.

This viewpoint suggests to me that there is no room for prior restraint or censorship in choice of topics for classroom speeches. At the same time, there is no place for unquestioning acceptance of the advocacy of widely accepted points of view which may not be supported by evidence of careful analysis. The proper study of rhetoric, of speech communication, or of whatever the au courant term is for making the truth prevail among men, demands critical evaluation of the rational methods used in arriving at all conclusions. The professional qualifications which are held to justify academic freedom, for both student and teacher, demand that each should apply the same critical standards to himself and to others who study and teach within the academy.

It is not pure idealism which leads me to urge the constant application of critical standards to views expressed by ourselves and others. Pragmatism leads one to the same position. Think for a moment about how well this attitude conforms to the Machiavellian principle reiterated by John Adams as he was joining with the others who worked out the basis for our constitution. Adams, characterized by Vernon Parrington as standing midway between Jeffersonian democracy and Hamiltonian aristocracy[7] took the position that "those who have written on civil government lay it down as a first principle...that whoever would found a state, and make proper laws for the government of it, must presume that all men are bad by nature; that they will not fail to show that natural depravity of heart whenever they have a fair opportunity."[8] It doesn't matter whether we would show depravity or sloth, we, as citizens and as scholars, cannot safely presume that agreement regarding conclusions suggests identity of evidence or reasoning supporting those conclusions. Nor can we assume that different conclusions always suggest that the other person is stupid or villainous. Our focus must remain on the process of arriving at those conclusions, and our classrooms must be testing grounds for the process; not for the conclusions.

There are those who hold that students should be prohibited from speaking about "insignificant topics," and I agree--but I submit that it is the speaker who has not devoted himself adequately to his task who makes a topic insignificant or uninteresting. I accept the platitude that "there are no uninteresting topics, only uninteresting people." As I understand it, this would say that the person who makes

an insipid talk about "How to tie a shoelace" has done no better and no worse than the speaker who makes an insipid talk about "The Speech Communication Classroom and the First Amendment." He should be prohibited from delivering an insipid talk--and that is what he is there to learn about. The prohibition must come through his learning more about the elements of the rhetorical situation and how his own choices influence and are influenced by that situation. He learns about this process both by his own efforts at speaking, and by listening analytically to the efforts of others--including the teacher. A major responsibility of the teacher is to shape the rhetorical situation in the classroom by making the choices which help the students discover the worthwhile, the compelling, and the significant ideas about which he can speak with understanding and conviction.

I mentioned the notion that the elements of the rhetorical situation place certain restraints or constraints on the student speaker in the classroom. Certainly, the expectations built by past experience will tend to restrict not only the student's choice of topic but also his mode of treatment, unless he is the product of an unusually adaptive system of schooling. Conventions which grow almost imperceptibly through the physical arrangements of the schoolroom, the time units of the school day, and testing procedures generate these expectations. The more perceptible influences of teaching strategies and attitudes reinforce these expectations. In the best of all possible academic worlds, the limitations imposed by the standards of evidence, reasoning, organizations on audience analysis would be at least as significant as past experience, and would be much more germane to the study of rhetoric. It is certainly incumbent upon all of us to encourage the preeminence of these standards, and it seems to me that the best, if not the only way to do so is through the precepts of freedom of speech and academic freedom.

The social, political, and academic values inherent in the right of freedom to speak certainly imply the necessity of the reciprocal freedom to listen. If these freedoms have affirmative value, perhaps we should explore for a moment their opposites--the freedom not to speak, and the freedom not to listen. As I perceive it, when we enter the speech communication classroom we circumscribe these opposites in some measure. We do affirm that each person will have both the freedom to speak, in order to gain the experience he has the right to expect, and the responsibility to speak. He will also have the freedom to listen, in order to learn from the speaking efforts of others, and the responsibility to listen. The affirmation of the right and responsibility to speak, then, reinforces the responsibility to listen and to limit one's freedom not to listen. In similar fashion, the responsibility to listen enhances the responsibility to speak with intelligence and effectiveness. And

here again we see the convergence of the underlying assumptions of rhetoric, the First Amendment, and academic freedom.

Almost twenty years ago, Zechariah Chafee, who is respected as one of the best legal interpreters of the First Amendment, commented that "...the area of facts subtracted by law or public opinion from open discussion is constantly growing larger."[9] We might question that conclusion, in light of the increased diversity of liberation movements of the last two decades. We might say "Amen," in light of Viet Nam and Watergate. But I believe that Robert O'Neil has made the case for a reasonable understanding of the First Amendment freedoms in the conclusion to his chapter dealing with censorship and prior restraint. Here O'Neil said: "The First Amendment, then, clearly is not absolute. It contains important exceptions and qualifications. The basic safeguards of free expression cannot be understood apart from the limitations upon the exercise of that right. They are all part of a single system of concept. Freedom of Expression works only because there are such limits. Completely unrestrained liberty for everyone to speak would produce chaos and leave freedom only for the relatively few. The limits and exceptions must be narrowly circumscribed, of course, for there is great danger they may expand in such a way as to dilute the essential protections. Yet just as clearly, those limits must exist."[10] The limits, as I see it, grow out of the equation which must exist between freedom and responsibility in all of the traditions and the laws surrounding rhetoric, the First Amendment, and academic freedom.

It is within the context of these traditions and laws also that the Speech Communication Association developed its "Credo for Free and Responsible Communication in a Democratic Society." Two segments of this statement, developed over the period of a decade and endorsed in December of 1972, seem particularly germane to the question of freedom of speech in the classroom. The first says, "We support the proposition that a free society can absorb with equanimity speech which exceeds the boundaries of generally accepted beliefs and mores; that much good and little harm can ensue if we err on the side of freedom, whereas much hard and little good may follow if we err on the side of suppression." Then it affirms that, "We accept the responsibility of cultivating by precept and example, in our classroom and our communities, enlightened uses of communication; of developing in our students a respect for precision and accuracy in communication, and for reasoning based upon evidence and a judicious discrimination among values."

It is this kind of attitude which can develop citizen-scholars who will make our governments work better at all levels, and who may even find it in their minds and hearts to provide adequate support for the nation's educators.

FOOTNOTES

[1]Charles Sears Baldwin, Ancient Rhetoric and Poetic (New York, Macmillan, 1924), 9.

[2]Roderick P. Hart and Don M. Burks, "Rhetorical Sensitivity and Social Interaction," Speech Monographs, 39 (June, 1972), 76.

[3]Karl R. Wallace, "The Fundamentals of Rhetoric," in Lloyd F. Bitzer and Edwin Black, eds., The Prospect of Rhetoric (Englewood Cliffs, N.J., Prentice Hall, 1971), 7.

[4]Sidney Hook, Academic Freedom and Academic Anarchy (New York, Cowles Book Co., 1970), 35.

[5]Ibid., 34.

[6]Academic Freedom and Tenure, Louis Joughin, ed. (Madison, Wisconsin, The University of Wisconsin Press, 1969), 157.

[7]Vernon L. Parrington, Main Currents in American Thought, (New York, Harcourt, Brace, 1930), Vol. I, 307.

[8]Ibid., 312.

[9]Zechariah Chafee, Jr., "Does Freedom of Speech Really Tend to Produce Truth?" in The Principle and Practice of Freedom of Speech, Haig A. Bosonajian, ed. (New York, Houghton, Mifflin, 1971), 325.

[10]Robert M. O'Neil, Free Speech: Responsible Communication Under Law, (Indianapolis, Bobbs-Merrill, 1972), Second Ed., 47-48.

JULIAN BOND: A CASE STUDY IN A LEGISLATOR'S FREEDOM OF SPEECH

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As one of the most popular contemporary public speakers in the United States,[1] Julian Bond speaks in public at least 150 times a year. Ironically, the principle event which enable Bond to embark on a career as a professional public speaker was the infringement of his right to freedom of speech by the Georgia House of Representatives. This paper will discuss the circumstances surrounding Bond's being denied his seat in the Georgia legislature, the Supreme Court decision in the subsequent case, and the present status of Bond's First Amendment right.

This study, interestingly enough, begins where it ends--with the Supreme Court of the United States. In 1965, the Supreme Court handed down its decision mandating reapportionment of the state legislatures. The decision resulted in the creation of several new districts in the black neighborhoods of Atlanta. Julian Bond, upon constant urgings from his co-workers in the Student Nonviolent Co-ordinating Committee (SNCC, also called Snick), decided to run for the seat representing District 136 (now the 111th), Atlanta's West End, a predominantly (90%) black neighborhood.[2] Bond defeated two other black candidates, Rev. Howard Creecy in the primary election and Malcolm Dean in the general election, to win the House seat representing his district. In the 1965 general election, Bond carried 82 percent of the vote.[3]

The Disqualification

Representative Bond was prepared to quietly take his seat during the regular swearing-in ceremonies scheduled for January 10, 1966. However, on January 6, 1966 SNCC issued its policy statement on the Vietnam War. Space does not permit a verbatim printing of the document here, but the reader may recall that SNCC condemned the United States' involvement in Vietnam as a violation of international law and expressed sympathy with and support for those young men who refused to respond to the military draft.[4] As soon as the statement was released, Bond was contacted by members of the news media to get his reaction. Although he had not participated in its drafting, Bond stated that he did support the statement.

The principle evidence employed by the Georgia House of Representatives in refusing to seat Bond was a tape-recorded interview between Ed Spivia, a newscaster for the state-owned radio station WGST, and Julian Bond. Key statements from the interview will be cited here. Asked for specific reasons for his support of the SNCC statement, Bond declared:

> Why, I endorse it, first, because I like to think of myself as a pacifist and one who opposes that war and any other war and am anxious to encourage people not to participate in it for any reason that they choose. And secondly, I agree with this statement because of the reasons set forth in it--because I think it is sorta hypocritical for us to maintain that we are fighting for liberty in other places and we are not guaranteeing liberty to citizens inside the continental United States. . . . I think the fact that the United States Government fights a war in Viet Nam, I don't think that I as a second class citizen of the United States have a requirement to support that war. I think my responsibility is to oppose things that I think are wrong if they are in Viet Nam or New York, or Chicago, or Atlanta, or wherever.[5]

Spivia later asked Bond if his position represented taking a stand against stopping World Communism. Bond replied:

> Oh, no. I'm not taking a stand against stopping World Communism, and I'm not taking a stand in favor of the Viet Cong. What I'm saying is that, first, that I don't believe in that war. That particular war. I'm against all war. I'm against that war in particular, and I don't think people ought to participate in it. Because I'm against war, I'm against the draft. I think that other countries in the world get along without a draft--England is one--and I don't see why we couldn't too.[6]

Spivia then asked, "You don't think this is what would be necessary in order to fight this war in order to stop the Communism /sic./ from going any further?" Bond responded:

> Well, I'm not convinced that that is really what's going on, but I'm not prepared to argue it. You see, I don't want to say anything about that. I'm not convinced that we are really stopping International Communism. I like--not completely--but I like fairly well, the life I live now. You know, I don't want too many abrupt changes in a direction I don't like, to take place, but I'm not about to justify that war, because it's stopping International Communism, or whatever . . . you know, I just happen to have a basic disagreement with wars for whatever reason they are fought--fought to stop International Communism, to promote

> International Communism, or for whatever reason. I oppose the Viet Cong fighting in Viet Nam as much as I oppose the United States. If I lived in North Viet Nam, I might not have the same sort of freedom of expression, but it happens that I live here, not there.[7]

In addition to the recorded interview, Bond was called to stand for cross-examination during the hearings in the House. At that time he admitted his statements and clarified his position on "draft card burners."

> I admire people who take an action, and I admire people who feel strongly enough about their convictions to take an action like that knowing the consequences that they will face, and that was my original statement when asked that question. . . . I have never suggested or counseled or advocated that any one other person burn their /sic./ draft card. In fact, I have mine in my pocket and will produce it if you wish. I do not advocate that people should break laws. What I simply try to say was /sic./, that I admired the courage of someone who could act on his convictions knowing that he faces pretty stiff consequences.[8]

Taken together, the statements cited above constitute the damning expressions that the Georgia House of Representatives used as reason for denying Bond his seat in 1966.

Throughout these proceedings Bond declared his intention and readiness to take the oath of office as an indication of his loyalty to both the United States and Georgia Constitutions. Following Bond's testimony, the House resolved by a vote of 184 to 12 that "Bond shall not be allowed to take the oath of office as a member of the House of Representatives and that Representative-Elect Bond shall not be seated as a member of the House of Representatives."[9]

The District Court Litigation

Bond and his attorneys immediately appealed the decision of the House to the District Court for the Northern District of Georgia seeking injunctive relief and a declaratory judgment that the House action was unauthorized and violated his First Amendment right of free speech. The District Court rejected Bond's appeal by a 2-1 decision, reasoning that Bond's right to dissent as a private citizen was limited by his decision to seek membership in the Georgia legislature. The Court further concluded that the SNCC statement and Bond's remarks relevant to that statement went beyond reasonable criticism of national policy to provide a rational basis for the conclusion that he could not in good faith take the prescribed loyalty oath.[10]

The dissenting member of the District Court argued that the question of the power of the Georgia House to disqualify a duly elected member under these circumstances should be construed in such a way as to avoid unnecessary federal constitutional issues. The dissenter then reasoned that since Bond satisfied all the stated qualifications for membership his disqualification was beyond the power of the House as a matter of state constitutional law.[11]

From the District Court decision, Bond appealed directly to the United States Supreme Court. While his appeal was pending, a new election was called to fill the vacant seat in the Georgia House. Bond entered this election and was overwhelmingly elected. Again he was refused his seat in the House, and again an election was called. This time he eaked out a victory over Malcolm Dean in the primary (winning by only 50 votes) and easily won the general election of November 8, 1966.[12]

The Supreme Court Decision

The United States Supreme Court heard the arguments in the Bond v. Floyd appeal on November 10, 1966. The unanimous decision was handed down on December 5, 1966, and the judgment of the District Court was reversed. Julian Bond was seated as a member of the Georgia House of Representatives and awarded the back pay to which he was entitled as a duly elected Representative.

Chief Justice Earl Warren delivered the opinion for the Court. While recognizing that several issues were present in the case, the Court ruled that the violation of Bond's right to freedom of speech was sufficient to reverse both the House and the District Court actions.

The State of Georgia attempted to argue that the issues of racial discrimination and an alleged violation of the First Amendment should be considered separately. Warren responded:

> We are not persuaded by the State's attempt to distinguish, for the purposes of our jurisdiction, between an exclusion alleged to be on racial grounds and one alleged to violate the First Amendment. The basis for the argued distinction is that, in this case, Bond's disqualification was grounded on a constitutional standard--the requirement of taking an oath to support the Constitution. But Bond's contention is that this standard was utilized to infringe his First Amendment rights, and we cann't distinguish, for purposes of our assumption of jurisdiction, between a disqualification under an unconstitutional standard and a disqualification which, although under color of a proper standard, is alleged to violate the First Amendment.[13]

Warren then identified the crucial issue in the case as being, "Whether Bond's disqualification because of his statements violated the free speech provisions of the First Amendment as applied to the States through the Fourteenth Amendment."[14]

The State then argued that the requirement of a loyalty oath does not violate the First Amendment. The Court, while admitting the principle in general, pointed out that certain extensions of the principle, as represented by this case, could have unconstitutional results. Warren declared:

> Thus, we do not quarrel with the State's contention that the oath provisions of the United States and Georgia Constitutions do not violate the First Amendment. But this requirement does not authorize a majority of state legislators to test the sincerity with which another duly elected legislator can swear to uphold the Constitution. Such a power could be utilized to restrict the right of legislators to dissent from national or state policy or that of a majority of their colleagues under the guise of judging their loyalty to the Constitution.[15]

The opinion next considers the State's contention that even though Bon's statements would not violate any law if made by a private citizen the state may apply a stricter standard to its legislators. The Court resoundingly stated, "We do not agree." The State believed Bond's statements violated the Federal law prohibiting the counselling, aiding, or abetting of another person to refuse or evade military registration. Warren points out that Bond's statements are ambiguous on this point at worst, but further rejects the State's contention on the basis of Bond's uncontested testimony:

> I have never suggested or counseled or advocated that any one other person burn their /sic./ draft card. In fact, I have mine in my pocket and will produce it if you wish. I do not advocate that people should break laws. What I simply try to say was /sic./ that I admired the courage of someone who could act on his convictions knowing that he faces pretty stiff consequences.[16]

The Chief Justice concludes, "Certainly this clarification does not demonstrate any incitement to violation of law."[17] Finally, Warren clarified the Court's position on its refusal to accept a stricter standard for legislators than for private citizens.

> . . .while the State has an interest in requiring its legislators to swear to a belief in constitutional processes of government, surely the oath gives it no interest in limiting its legislators' capacity to discuss their views of local or national policy. The manifest function of the First Amendment in a representative government requires that legislators be given the widest

> latitude to express their views on issues of policy. . . . Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them.[18]

Certainly, then, the Supreme Court believes that elected officials, specifically legislators, are entitled to the same First Amendment protection as private citizens. The Court also indicates that the qualifications for a state legislator cannot be interpreted in a way that constitutes an infringement on the legislator's right to freedom of speech; a right that is necessary in a democratic society to enable the electorate to be better informed about the candidates whom they select to represent them.

Conclusion

Perhaps the most notable thing about his case study is the precedent it represents. Prior to this time no court had intruded into the hitherto sacrosanct power of a legislative assembly to determine the qualifications of its members as guaranteed by Article VI of the United States Constitution. Now the Supreme Court has, by its decision in this case, extended federal power over decisions concerning the qualifications of state legislators. In essence, the Court has said that the specified oath of office cannot be extended either by fact or by implication to override the protection afforded all citizens, public as well as private, by the First Amendment.

One thing the Supreme Court cannot reverse, however, is human nature. Chief Justice Warren stated that legislators are entitled to the protection of their right to free speech ". . . so /their constituents/ may be represented in governmental debates by the person they have elected to represent them." The citizens of Georgia's 111th House District had to elect Julian Bond three times before he was seated in the House, and they have subsequently re-elected him (running unopposed) three more times. But in all those years as a representative, Julian Bond has spoken from the floor of the House only once. Late in the 1972 session Bond spoke on behalf of his bill providing mandatory tests on all new-born Negro babies for sickle-cell anemia.[19] The bill passed unanimously, largely due to its humanitarian appeal.[20]

Although Julian Bond won his seat to the Georgia House of Representatives, he did so at the expense of strong resentment and prejudice on the part of many of the white legislators. This resentment and prejudice limited his power to participate in debates

on the floor because he felt the hostile feelings were strong enough to defeat any legislation on which he took a stand. Phil Garner of the Atlanta Journal and Constitution Magazine reported, "Bond had recognized that his support could be the kiss of death for most bills affecting blacks, and cited that as his reason for keeping quiet."[21] Other astute political observers agree that Bond was justified in holding this belief.

> What ended Julian's successive incarnations and evaporations as a legislator was a Supreme Court decision . . . that the House had acted unconstitutionally the first time they refused to accept him on the floor. Even then, one rural county representative vowed, 'It don't make no different. He's done ruined Hisself in here. He won't get to first base. All he'll be doing is sitting in that chair for two years. That's all it'll amount to.'[22]

While Bond has managed to "sit in that chair" for a considerably longer period than two years, the other aspects of the threat seem to have come to pass. Since Bond has resumed the silence following that one occasion, he must still feel that his support of a piece of black legislation will surely defeat it.

This hypothesis, while possible and even probable, cannot be empirically established for the reason that Bond has not spoken. The one time he did speak the bill passed, but that has been attributed to the humanitarian nature of the bill. Taken by itself, Bond's reluctance to speak from the floor of the House does not mean that Bond's freedom of speech has been abridged. Many legislators are more effective in committee sessions or other legislative groups than in legislative debates and consequently to not often participate in those debates. However, Bond is not an active force in any of the committees on which he serves (Education, Insurance, and State Institutions and Property) or on the Fulton County delegation which comprises all the legislators from the Atlanta area. Roger Williams states:

> Bond has not spoken publicly on the floor of the House in the five years he has been there. He seldom speaks up in committee meetings, and he is a minor figure in both the Fulton County delegation and in the legislative Black Caucus.[23]

Bond's relative silence in these other legislative functions further supports the hypothesis that Bond senses some fairly strong political intimidation.

Whether it is true or not that the resentment and prejudice on the part of many of the white legislators would result in the defeat of any legislation Bond supports, he thinks that is the case. Consequently, his freedom of speech is circumscribed by his perception of the situation. There are some indications that the resentment and

prejudice still exist. Phil Garner wrote in 1972 that some members of the legislature who have been there since before the Bond disqualification still refuse to introduce themselves to him or to be sworn in with him.[24] The House changed its swearing in procedure in 1967. Now Representatives are sworn in by groups of sixteen rather than altogether. Roger Williams explains the reasoning behind this change.

> To soothe the sensitivities of the Lane-Floyd contingent, the House authorities had devised a new scheme for searing in members: It would be done in small groups rather than en masse, so that the bitter-enders would not have to say they had shared an oath with the infamous Mr. Bond. That wasn't good enough for Sloppy Floyd, who ceremoniously absented himself from the chamber while the group that included Bond was being sworn in.[25]

While the residents of Georgia House District 111 are getting effective nation-wide representation through Bon'd popularity as a public speaker, one wonders how well they are really being represented in "governmental debates by the person they have elected to represent them." Even so, Bond believes he is a good representative for his constituents,

> I know I'm not going to get beaten in this stuff . . . and you know why? It's not because I've been on TV so many times and it's not because I make a lot of speeches. It's because, for this district, I'm a good representative. . . . It's because people know they can call me up and come see me and I'll go to bat for them. I can drive down a street that used to be muddy and now it's been paved--because I made a complaint. Or, I can go down another street, where they used to have purse-snatchers, and now it's police-patrolled.[26]

So Bond uses his position to get local improvements for his district, but sits mutely by during legislative debates.

Whether Bond's reluctance to speak in the Georgia House of Representatives constitutes an infringement of his freedom of speech or is merely a recognized and accepted political strategy on his part is open to debate. Certainly, if he were to rise to speak to the members of the House he would be granted the floor. His speech in support of the sickle-cell anemia bill proves that. But the hostility is still there. In the traditional interpretation of the issue of free speech, Bond is not being denied his right, but perhaps Speech Communication scholars should take this opportunity to consider exactly what issues do and do not properly belong within the First Amendment guarantee of free speech.

FOOTNOTES

[1]Roger M. Williams, The Bonds: An American Family (New York: Athenium, 1971), 257.

[2]Ibid., 216-217.

[3]Ibid., 218.

[4]The complete text of the SNCC statement is included in Chief Justice Warren's opinion in the case Julian Bond, et al. v. James "Sloppy" Floyd, et al., 87 S. Ct. 339 (1966), 341-342.

[5]John Neary, Julian Bond: Black Rebel (New York: William Morrow and Company, Inc., 1971), 93.

[6]Ibid., 96.

[7]Ibid.

[8]87 S. Ct. 339 (1966), 343.

[9]Ibid., 344.

[10]Ibid., 345.

[11]Ibid.

[12]Williams, 232.

[13]87 S. Ct. 339 (1966), 347.

[14]Ibid.

[15]Ibid.

[16]Ibid., 348.

[17]Ibid.

[18]Ibid., 349-350.

[19]"Silence Broken, Julian Bond Wins," Atlanta Journal (March 2, 1972), 2.

[20]Phil Garner, "Julian Bond in a New Role," Atlanta Journal and Constitution Magazine (April 9, 1972), 12.

[21]Ibid.

[22]Marshall Ftady, "The Infamous, Mr. Bond," Saturday Evening Post, 240 (May 6, 1967), 94.

[23]Williams, 259-260.

[24]Garner, 12.

[25]Williams, 233.

[26]Neary, 152-153.

PHILOSOPHICAL ASSUMPTIONS UNDERLYING PLATO'S THEORY OF FREEDOM OF SPEECH: A COMPARISON WITH THE THEORY OF DEMOCRATIC INDIVIDUALISM

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The nature of the individual and his potential for self-realization provide the rationale for a theory of freedom and equality. The theory of freedom and equality should always be considered in terms of the individual. In order to understand freedom, most specifically freedom of speech, the nature of the individual must form the basis of such an understanding.

In order to clarify the differences between Plato's conception of the individual and the conception of modern democratic theory, an explication of modern theory is essential.

Perry refers to today's individualism as the "individualism of social democracy." It is "the antithesis of the universalisms, abstract and organic."[1] Perry terms the individual the "concrete particular." Furthermore, the individual, not the society, is the integral unity, or the "constituent member." The individual, according to Perry, is still a member of society with social responsibilities in spite of his identity as a "constituent member." The "good life" which this individual chooses is the achievement of anything he might "consciously will and desire."[2] He makes such a choice subsequent to thought and deliberation. His rational faculty then becomes the necessary prerequisite to the determination of the means to be used to achieve his ends. An individual who has neglected his rational faculty is thought to be "underdeveloped" and is an "incomplete" and "debased individual."[3]

The good of the individual is individualistic for two reasons. It is first of all something he has chosen, not something chosen by the state or a higher authority.[4] Secondly, it is individualistic because it differs from other conceptions of good.[5] There is no objective good which exists over what the individual "desires and wills."[6] The good is desirable because it is sought by an individual whose rational faculty is developed; it is not sought because it is inherently desirable.

The individual is viewed as someone capable of "continuous self development and perfection," particularly the rational element of

the individual.[7] The value of the individual resides in the fact that he is viewed as being capable of the rational determination of ends and means. Perry refers to the individual as the "moral finality." The state can only intervene in the lives of individuals to provide them greater opportunities for their development. The state and the society are justified in terms of the values embodied in the individual.[8] Hocking describes individualism as the concern for individualism above all else. Individualism is the "belief in the human individual as the ultimate of social structures."[9]

Such an individual can only express and develop his potential if he is free. Freedom, according to modern theory, is the opportunity to function in a particular area without restrictions. The individual should be able to seek ends and satisfy desires without fear of punishment. The state or other individuals should not be able to use punishment as a tool to coerce individuals into taking a particular position.[10]

Freedom, of course, is not absolute and restrictions do exist. Responsibilities are reinforced by restrictions. Such restrictions exist in the form of laws or in the precept that the individual has certain obligations to his fellow citizens and to the state which has its roots in the threat of legal action.[11]

The freedom which the individual enjoys obligates him to observe the freedom of other citizens. His right to protection from coercion and his right to exist in a stable and orderly society imply that he exhibit loyalty to his state and fulfill certain service or financial obligations. Such responsibilities must not be arbitrarily or willfully imposed. An individual must know specifically the nature of all restraints and obligations. He is thus protected from intrusion or coercion in actions not legally proscribed which directly relate to him.

The individual, however, does retain freedom in two distinct areas, political freedom and freedom of thought and speech. Full political freedom necessitates many of the guarantees of civil rights, i.e., the right to think, to speak, and to worship without government coercion.

According to Plato, the individual is still a "concrete particular" and a "constituent member" of society rather than merely a part of the organic whole.[12] The concrete human individual in Plato's view is the human soul. This soul is composed of three parts; the rational, the spirited, and the appetitive.[13] The rational part is composed of specific metaphysical substance which is immortal and incorporeal. The two remaining elements comprise the mortal elements and deal with bodily functions.[14] In human life the individual's personality or consciousness involves the entire soul being composed of three parts.[15] The whole soul's peculiar function is well performed and the soul achieves its proper arete, or justice, or good, only when

the three elements are acting properly, with the whole soul being under the control of reason.[16]

Perry makes the point that the concrete human individual is also the soul in Puritan thought. Just as the emphasis that Puritanism places upon the soul expresses its belief in the concrete particular opposed to abstract universalism, so Plato's concern for the individual moral well-being of the soul reflects a similar philosophy.[17] Each individual's good, his arete, is the realization of the distinctive function of man. But it is the individual who realizes or does not realize that particular function. In a manner very similar to the modern theory of individualism, Plato seems to conceive of the individual as a "constituent member of the polis, rather than merely a part of the political organism, subserving it with no end of its own. Often justice and good of the individual is identified with that of the polis. The individual's sole purpose is seen as the bringing about of justice for the polis.[18] In actuality, the justice of the individual and the Polis can be differentiated. One discovers that Plato is concerned above all with the individual.[19] Just as in the modern democratic theory of individualism, developing and attaining the good requires some exercise of reason. Plato's peculiar brand of reason, though, is of a moral type, involving knowledge on how to act morally rather than involving strict scientific knowledge.[20]

What seems to separate Platonic theory from the democratic individualistic theory is the interpretation of the good of the individual. Democratic theory holds that the good of the individual is to be determined by the individual himself, and that this good is the result of reflection and deliberation. For democratic individualism, the good of the individual is individual not only because the individual views it as his good, but because it is his conception of what is good. It is what he desires, not what the state or an external force thinks he should want. His good is individual. It is different from other conceptions of what is good. Good is what is desired, and according to the democratic theory, there are as many different goods as there are desires. For Plato, the good, justice, or arete of the soul is the same for all men.[21] Arete is desirable because it entails the realization of the individual's primary function or nature.

Plato contends that each individual desires what equals his true good. However, Plato believes that an individual is equally mistaken or ignorant of what comprises his good.[22] The individual might desire glory, fame, or wealth. But his true good lies in the inward condition of the soul, in realizing the proper harmony of the various parts of the soul. Such harmony constitutes justice and results in the arete of the individual.[23]

The function of the polis is to provide the individual with the proper education so that the individual will understand the nature of the good which he seeks.[24] Through education the polis reveals to the individual the nature of what he really desires, his own true good.[25] This good can only be realized in one way, through the attainment of the arete appropriate to all men.[26] As in the theory of democratic individualism, the development of the individual is not confined to a small group, but it is possible for all people, if the development is conceived to be the attainment of justice with the soul.

Plato conceives of freedom primarily as moral freedom. In contrast to the modern democratic theory of freedom, action which proceeds without coercion is not necessarily free for Plato.[27] To Plato, a despot or a dictator is truly unfree for he is a slave to his passions and appetites.[28]

True freedom is control of the soul's rational element over the spirited and appetitive element. According to Plato, to act motivated by desire or impulse is to act unfreely. If the individual is able to master the rational aspect of his soul, he can still satiate the legitimate desires and impulses of the appetitive part. The primary send of freedom then is a mastery of reason. Socrates states Plato's belief clearly in the Republic:

> It is better for everyone to be governed by the divine and intelligent, preferably and willing and his own, but in default of that imposed from without, in order that we all so far as possible may be akin and friendly because our governance and guidance are the same. . .it is plain. . . that this is the purpose of the law. . . and this is the aim of our control of children, our not leaving them free before we have established, so to speak, a constitutional leader within them, and, by fostering the best element in them. . .have set up in its place a similar guardian and ruler in the child, and then, and only then, we leave it free.[29]

Only if such rule is achieved can the individual act freely. In the ideal polis the attainment of such freedom through having an inwardly just soul is necessary in order to begin any social function that would contribute to the attainment of the justice of the state.[30] Thus, freedom for Plato is the control of the rational faculty of the soul over the spirited and appetitive parts, or perhaps, the absence of desire and impulse except in the case of vital desires such as hunger and thirst.

For Plato, freedom has a different connotation than the kind of absence of coercion in democratic theory. To act motivated by desire and impulse is to act unfreely, just as to act contrary to one's intention because of coercion is to act unfreely in democratic theory.

Plato's view that the individual can be coerced by himself, seems paradoxical to the democratic mind. Coercion, according to democratic theory, implies influence on the part of another individual or the state which arbitrarily thwarts an individual from an intended course of action.[31] Desires and appetites might motivate an individual to action he subsequently regrets. But an individual does not seem to be obligated to act rationally. Rather, he is obligated to act freely from desires which have been deliberated and whose satisfaction is in accord with the legal and social order.

For Plato, however, the individual's most vital element is the rational element of the soul. Man possesses within his soul appetites and desires as well as a spirited element. If the individual is to retain moral freedom, he must act under the guidance of the rational aspect of his soul. He must never make choices based on desire and impulse no matter how much rational deliberation has preceded such a choice. All choice must be made by the rational aspect of the soul although the appetitive part might originate such desires. Although hunger might cause us to want to eat, the rational aspect must tell us what and how much to eat.

Therefore, many of the freedoms associated with democratic individualism would be curtailed in Plato's polis although not for the same reasons. The principle for restriction is based on the harmful effect that there might be on the development of the individual himself. While modern theorist such as John Stuart Mill would allow the individual to destroy himself as long as this would not interfere with the rights of others, Plato would restrict any thought or action which prevented the individual from achieving the arete of his soul or which disrupted his arete once it had been attained.

The purpose of education in the practical polis of the Laws is the development and preservation of "temperance," comparable to arete within the soul of the individual.[32] Temperance of a sort is first obtained by children when they "take pleasure and pain in the right things." For "liking what one ought to like and disliking what ought to be disliked" constitutes the goodness of the child; later in the child's development the harmony resulting from the consent of rational judgment to these likes and dislikes constitutes the temperance of the mature individual. Education is thus "the rightly disciplined state of pleasures and pains whereby a man, from his first beginnings on, will abhor what he should allow and relish what he should relish. . . ."[33] It is the process of drawing and guiding children towards the principle which is pronounced right by the law and confirmed as truly right by the oldest and most just,[34] a process which culminates in the attainment of the individual's temperance, or his arete. Although Plato describes how the individual upholds his arete throughout his mature years by partaking only of the right kind of music, dance, and literature, we shall restrict ourselves at this point to oral and written communication.

The subjects of the educational curriculum enable the individual citizen to attain and preserve as far as possible his excellence, the proper balance within his soul.[35] Between ten and thirteen, the youth is to study his letter enough to read and write.[36] However, what the students are to read is sharply restricted. The literature in the schools of the polis is to be of the morally edifying sort making up the content of the Laws itself.[37] Teachers are also required to teach the elementary facts of astronomy, arithmetic, and geometry.[38]

The specific content of the educational system has practical implications for freedom of speech, for the citizens are to learn about astronomy so that they will not blaspheme the heavenly bodies, the gods of heaven, but are "always to speak piously both at sacrifices and when they pray reverently at prayers."[39] The right conception about these divinities, the sun, the moon, and other heavenly bodies is that each one of these bodies "always revolves in the same orbit and in once orbit, not many."[40] The confidence with which these doctrines are expressed and the specific limitation put on citizens seems to imply that any expression contrary to the doctrine of the polis would not be tolerated.

However, the belief and expression of a specific doctrine has a definite purpose. The injunction to all citizens to "emulate" God[41] underscores the importance of each citizen having the right sort of astronomical knowledge.

> The motions akin to the divine part in us are the thoughts and revolutions of the universe; these, therefore, every man should follow, and correcting these circuits in the head that were deranged at birth, by learning to know the harmonies and revolutions of the world, he should bring the intelligent part according to its pristine nature, into the likeness of that which intelligence discerns, and thereby win the best life set by the gods before mankind both for this present time and for the time to come.[42]

Here is an indication of the good of astronomical education. It is an indication and justification for any limitations or restrictions in the educational system in that all education is for the virtue or arete of the individual citizen, not merely for a well-ordered state in which freedom and amity appear in due proportion.

Plato's concern for each individual's arete is so prepossessing that he forbids those to speak who express doctrines contrary to the attainment or perpetuation of arete. Though some of his restrictions seem unusually severe, Plato views them as necessary to protect individuals from themselves and to prevent each individual from self-anihilation. He does not condone the expression of atheistic beliefs which deny the existence of God or declare God to be evil.[43] Plato holds that such beliefs have harmful effects both upon the soul of the

atheist and those citizens whom he seeks to influence. He asserts the existence of God and believes any denial of this belief is a dangerous and corrupting force. Since God is the model whom all citizens are to imitate, the removal of this standard would mean the cessation of the search for moral well-being which is ideally represented in God.[44]

FOOTNOTES

[1]Ralph Barton Perry, Puritanism and Democracy (New York, 1944), 269.

[2]Ibid., 443.

[3]Ibid., 451.

[4]Ibid., 443, cf. 360 ff.

[5]Ibid., 455 ff.

[6]Ibid., 443.

[7]Ibid., 450-53.

[8]Ibid., 444.

[9]William Ernest Hocking, The Lasting Elements of Individualism (New Haven, 1937), 3-4.

[10]Fredrich A. Hayek, ed., The Constitution of Liberty (Chicago, 1960), 16-18.

[11]Carl L. Becker, Freedom and Responsibility in the American Way of Life (New York, 1955), 3-5.

[12]Perry, op. cit., 443.

[13]H.W.B. Joseph, Essays in Ancient and Modern Philosophy (Oxford, 1935), 41-88.
N.R. Murphy, The Interpretations of Plato's Republic (Oxford, 1951), 24-25.
R.L. Nettleship, Lectures on Plato's Republic (London, 1906), 14-61.

[14]Paul Shorey, Trans., The Republic by Plato (London, 1946), I, 405-407, 441c.

[15]Joseph, op. cit., 41-83; Murphy, op. cit., 24-25; Nettleship, op. cit., 144-161.

[16]Shorey, op. cit., I, 405-417, 441c-445b.

[17]Perry, op. cit., 270.

[18]cf. Meyer Reinhold, Essentials of Greek and Roman Classics: A Guide to the Humanities (Woodbury, New York, 1946), 193-196.
Leo Rauch, The Republic and Selected Dialogues (New York, 1964), 26-33.

[19]Shorey, op. cit., II, 455, 604a, 407, 441d-e, 413-15, 433c-e.

[20]cf. Murphy, op. cit., 97-129; Shorey, op. cit., I, 357, 430b, 407-411, 441e-442d, 415-417, 443e-444a, II, 395-397, 586e-587a, 509-511, 618c-d.

[21]Shorey, op. cit., I, 105, 353d-e, II, 369-71, 580c-d, 379, 582e, 389, 585b-c.

[22]Ibid., II, 391, 586a.

[23]Ibid., II, 395, 586a-587a.

[24]Ibid., II, 55-77, 497a-502c.

[25]R.G. Bury, trans., Laws by Plato (London, 1952), I, 65, 643e-644a.

[26]Shorey, op. cit., I, 105-107, 353d-e.

[27]Ibid., II, 277-303, 555b-562a.

[28]Ibid., II, 303-305, 562a-576b.

[29]Ibid., II, 409-411, 590e-591b.

[30]Ibid., I, 415, 443e.

[31]Hayek, 16-19.

[32]A.E. Taylor, trans., Laws by Plato, Edith Hamilton and Huntington Cairns, eds., Collected Dialogues (New York, 1964), 1284, 689d.

[33]Ibid., 1250, 653c-d.

[34]Ibid., 1256, 659d.

[35]Morrow, op. cit., ch. VII.

[36]Taylor, op. cit., 1330, 809c.

[37]Ibid., 1381-82, 811c-d, 1419, 858e.

[38]Ibid., 1387ff, 821c-d.

[39]Ibid., 1391, 821c-d.

[40]Ibid., 1391-92, 822.

[41]Ibid., 1307ff, 7166ff.

[42]Benjamin Jowett, trans., Timaeusm by Plato, Edith Hamilton and Huntington Cairns, eds., Collected Dialogues (New York, 1964), 209, 90c-d.

[43]Taylor, 1440-45, 885-89.

[44]Ibid., 1307, 716a.

THE WATERGATE SCANDAL AND THE MASS MEDIA: THE EARLY PHASES

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> I can now say categorically that his /John Dean, III/ investigation indicates that no one on the White House staff, no one in this administration, presently employed, was involved in this very bizarre incident. What really hurts in matters of this sort is not the fact that they occur, because overzealous people in campaigns do things that are wrong. What really hurts is if you try to cover it up.
>
> Richard Nixon
> August 29, 1973
> San Clemente, California
> Press Conference

The relationship between Richard Nixon, his staff, and the mass media has always been somewhat checkered. In the fifties and early sixties, Nixon's greatest fear and deepest source of chagrin centered around the media's treatment of him; he complained incessantly that he was being "kicked around." In the late sixties and seventies, however, a seemingly new Nixon emerged, intent on "selling" the president, and well aware of his need for media access. This strange mixture of distrust and fear compounded with a keen recognition of the need for exposure led Nixon to precipitate what must rank as the most awesome test of the mass media in America. The period from the early spring of 1972 to the fall of 1973, with the conventions, election, and attendant Watergate activities, comprises the most challenging period ever for the print and broadcast journalists of America.

Both the administration and the media were well aware that an epic battle had been joined. The Vice President had been early to the lists with a blazing attack on televised news, an attack to be followed at a later date with antitrust actions, prosecution of both print and broadcast journalists for failure to divulge sources, and massive cuts in funding for public television. Agnew was merely a spearbearer, however, for a policy of press harassment which was directed by the

White House. James Keogh, former advisor to the President on media affairs and a staunch supporter of the administration's action, indicates in his virulent attack on the media, President Nixon and the Press, that the frontmen in dealing with the press were Klein and Ziegler, but that, to use his military language, "the chain of command ran very directly to Haldeman and ultimately to the President himself."[1] Nixon, who had won the 1968 election with only 43.4 percent of the popular vote, the lowest percentage for a winning candidate in half a century, blamed the press for his poor showing, and was determined he would do better in 1972.

As the battle lines between administration and press were sharpening, a seemingly small event occurred which was destined to change the history of the republic, and to test the mettle of the press. On June 17, 1972 five men were apprehended at the Watergate in the offices of the Democratic National Committee. The Administration immediately denied any connection between the Watergate burglars and the campaign to re-elect the President. The press, on the other hand, was free to find what it could. The results of the press investigations are, of course, now emblazoned in every American's consciousness. It is easy to forget, however, what a perilous beginning the Watergate investigations had, how uneven the progress was, and how close to complete failure the effort came.

The story of the Watergate investigation from the break-in itself until the election is largely a record of the achievement of one newspaper, The Washington Post; the earliest phase of Watergate is largely the account of two cub reporters and a dauntless newspaper against a popular and vindictive president. The two reporters, Carl Bernstein and Bob Woodward, have chronicled their lonely task in the bestseller, All the President's Men, one of the finest books on investigative journalism of this decade; Woodward and Bernstein paint an eerie picture of reporters badgered by events, encumbered in seamy plots, and overwhelmed by the corruption they discover. Their pursuit of the truth often involved tortuous ethical questions, and frequently the reporters' judgments of their own conduct sounds remarkably like the behavior of the Watergate principals they sought to investigate. Speaking in the third person about themselves and their covert dealings with grand jurors, for example, Woodward and Bernstein observe that they "had chosen expediency over principle and, caught in the act, their role had been covered up. They had dodged, evaded, misrepresented, suggested and intimidated, even if they had not lied outright."[2] The legal, moral, and political universe Bernstein and Woodward charted in their day to day reports and their book was indeed Byzantine; at one point the reporters actually feared for their lives. In the Washington of Watergate, Deep Throat, the reporters' one impeccable source, declared "Everyone's life is in danger" (p. 317).

Given this context, Edward Jay Epstein's well circulated and widely discussed article "Did the Press Uncover Watergate?" which has as its thesis the allegation that regular government institutions and investigators uncovered Watergate and that Woodward and Bernstein only added "fuel to the fire" seems particular fallacious.[3] As Epstein well knows, the fire would never have been ignited without the spark of the Post. The Justice Department and FBI had, as he indicates, discovered most of the evidence, but he fails to mention they quickly filed it away, ignoring all the loose ends, contenting themselves to indict only the low level operatives seized at the Watergate and Liddy and Hunt. Woodward and Bernstein make this point most forcefully in their narrative: "The Justice Department had turned away from investigating the real conspiracy of Watergate; had focused on the narrow burglary and bugging at Democratic headquarters . . . and ignored the grand conspiracy directed by the President's men to subvert the electoral process"(p. 155). Epstein seems quite proud that the prosecutors and grand jury developed "an airtight case" (p. 22) against Liddy, Hunt, and the burglars; he ignores the fact that the Watergate case was, to borrow the argot of the Watergate plotters, "contained" and the higher ups were set to "stonewall." Bernstein and Woodward began to do what the Justice Department and FBI refused to do; they were to look higher up. One of the most moving moments in All the President's Men occurs when, four months after the break-in, Bernstein first "considered the possibility that the President of the United States was the head ratfucker" (p. 129). For the Justice Department and the FBI, this was obviously an unthinkable possibility.

Similarly, Epstein's arguments that it was Judge Sirica's pressure which broke the case overlooks the influence the Post had had on both the Judge and the mood in Washington. The Post had raised the questions; it had laid the groundwork for further investigations. Epstein's observation that once the Watergate Committee and the Judiciary Committee entered the picture, the role of the press changed from investigative reporting to chronicling hearings is obviously accurate. It is equally obvious that each of these committees was as much a response to media revelations as to any institutional pressures.

The wealth of material detailed in All the President's Men makes it hard to understand why the reporters and the Post were so alone in the initial investigations of Watergate. The press, as Jack Anderson revealed in his column dated July 25, 1973, had solid information about the Watergate plot months before the break-in and the actual arrests. According to Anderson, James McCord, who was working on security in New York City for Nixon's advertising agency, the November Group, told old FBI friends of plans to monitor the offices of the Democrats. To quote Anderson, "the word spread through the investigative community, reaching us in Washington two months before the celebrated Watergate break-in."[4] The press was forewarned, then, and well aware of the tactics the administration was employing against its enemies in the

Democratic Party and in mass media. Yet it was the Post alone which put the fragmented picture together, placing the blame for Watergate on the doorstep of the president.

One good indication of how alone the Post was in its investigation is the matter of the Pulitzer Prize. James Brady, writing in New York, analyzed a good deal of the debate around the award. According to Brady, at the initial discussion of awards, several jurors were still "skeptical about the accuracy of the Post's stories" and one objected most strenously to awarding a prize to a "series based almost exclusively on anonymous sources."[5] This discussion occurred before the McCord letter but well after the election and in the new year. Thus when the jury voted for the first time, the Post came in third. By the time of the advisory board meeting in April, the case has broken, the Post was vindicated, and the prize was pre-ordained. The point, however, remains that almost nine months after the Post series, the most influential and critical of media commentators were still unwilling to praise the Post for its Watergate series.

Through the Post was alone in the investigative end of Watergate, each of the paper's allegations during phase one became a news event in itself, and other papers were quick to cover the charges and countercharges, the denials and recriminations. As Elizabeth Drew noted in her "Watergate Diary" in Atlantic, the Watergate story fed on itself; she explained: "the news and the events it is about are often part of the same process in Washington--the news is an event, affecting the next event, which is then in the news—but never, in memory, to this degree."[6] The election of 1972 became not only a battle between Nixon and McGovern; it was war between the White House and the Washington Post. Most of the rest of the press served as foreign correspondents in the battle, viewing most of the fireworks at a distance, feeling sympathy for their comrade, the underdog Post, but still fearful of reprisals from the White House and from a reading public who were angry to hear of the conflict in the first place and temperamentally inclined to kill the messengers who brought news of the fray.

Witness the coverage afforded Watergate in the New York Times. The Times treated Watergate with a reticence rarely seen in even the most pedantic and pristine academic circles. Events that would usually provide the grist for impassioned editorials or major exposes and in depth analysis were reported without comment. Early in June, the Times was well aware something clandestine and unseemly was beginning in the campaign. On June 11, for example, the Times featured a page one story on a fourteen week drive by Nixon fundraisers which had netted ten million dollars, and commented quite perceptively on Mr. Stans' tour of the country seeking anonymous contributions. On June 18, one day after the break-in, the Times developed the Miami, Cuban, CIA links to Watergate in a page thirty story. Despite all these leads, however, within one week, the Times fell back on a truly staid journalistic stance, noting that while the "motive was a mystery,"

little could be stated factually, since "all information is unofficial or has been leaked by unnamed sources," an obvious reference to Post revelations.

From this point on, the Times coverage is clinically detached: facts were reported without analysis, and there was no speculation offered on quite mysterious revelations. The Times reported the flight of Mr. Hunt, the request that hearings be put off, the laundering of money in Mexican banks, and a twenty-five thousand dollar check tied to the Committee to Re-elect the President, all rather dispassionately. In August, a guarded editorial called for an audit of Republican finances as suggested by Senator Proxmire, for the appointment of a special prosecutor, and for the cessation of a Justice Department program to defend Colson. Yet a week later, the Times reported McGovern's charges that the White House is involved without taking any position, reported Congressman Patman's charges that investigations are being obstructed without comment, and reported Agnew's and Nixon's stinging denials without any analysis. This detachment characterized the Times approach throughout July, August and early September. Editorials by W.V. Shannon stressed the seriousness of the scandal, charging a cover-up, but it was mid-September, at the time of the first indictments, until the Times took a strong editorial position, indicating quite clearly that the "indictments do not resolve larger, more serious questions of who was ultimately responsible" and declaring quite forcefully that "the voters are entitled to know the facts before Election Day." This editorial marked a real watershed in the coverage by the New York Times; from this point on, the Times moved more and more to the role of combatant and joined the beleagured Post in its efforts to uncover the facts.

The administration seemed aware of this shift, for the next week saw Pat Nixon come out to declare the Watergate "had been blown out of proportion," Senator Scott declare the Watergate "had evaporated as an issue," and Vice President Agnew charge that Watergate "was 'set up' by someone attempting to embarass the Republican party." Agnew quickly retracted the statement, and the administration tried to quiet further discussion by arguing that further exposure would prejudice criminal proceedings. Mr. MacGregor declared it was crucially important that "the press not discuss this in such great detail as to possibly prejudice any trial." Within a week, however, the Post linked Mitchell to the Watergate, and the Times, which by now had confirmed much of the same material, was quick to argue that Judge Sirica should allow the press to continue its investigations and revelations.

Peace rumors began in October, however, and Watergate was pushed from the attention of the press. The last two weeks of October, key weeks before the election, the press was mesmerized by rumors of an end to the Vietnamese war. Two fiery editorials appeared in the Times October 19 and October 25, but the emphasis shifted to the apathy and indifference of the American people when confronted by the Watergate

revelations. The Times had just received a report of a Harris poll indicating that only 52 percent of the voting public had ever heard of Watergate, that more than half of those who had heard thought it was mostly politics, and the vast majority completely absolved Nixon of any Watergate wrongdoing. The Times evidently found itself caught in a war not only with the Administration, but with the bulk of its readers, and again attacked the apathy and indifference of the public in an October 29th article. The landslide of the election was right around the corner, however, and after reporting Colson's charges that CBS and Washington Post news reports and editorials had been "unconscionable" and his declaration that Post editor Bradlee was a "self-appointed leader for a tiny fringe of arrogant elitists," the Times allowed Watergate to drop into oblivion in November and December of 1972.

The story of the national news magazines' treatment of Watergate is a mirror of the New York Times coverage: first a detached report of Post charges, then acceptance and advocacy, followed by an attack on public apathy, and finally a suspension of coverage after the election. Time, to take but one example, began June praising Nixon for his summitry in Moscow and blasting him for his failure at home. First reports of the break-in appeared in an issue with Woody Allen as a cover celebrity, and suggest the political implications of what the magazine saw as "an extraordinary bit of bungling." This same issue, ironically the issue dated July 3, 1973, balanced Mr. O'Brien's charge that Watergate was "blatant political espionage" against Mr. Ziegler's reply that it was a "third rate burglary attempt." The editorial comment is quite revealing: weighing the possibility that the bugging was to uncover or to close damaging leaks of administration information, Time concluded that the "trouble with both theories is that they ascribe slightly sophomoric motives and methods to presumably serious men."

Time was not to take Watergate seriously for a few months: July 10, the magazine reported the Mitchell resignation as a purely personal affair; July 17, it discussed the changes in the Democratic party with no allusion to Watergate; July 24, it mentioned the strange role of Douglas Caddy in the initial arrests, but kept the focus on the national campaign; July 31, Fischer and Spassky took over; August 7, the Eagleton affair exploded; August 14, Shriver was chosen, and this action overshadowed the short report on the trouble the Justice Department was encountering in gathering information; August 21, the cover story was sex and the teenager, and Watergate was unnoticed; August 28, the emphasis was on the Republican convention and the nomination of "King Richard," though by this point, Time was bold enough to assert that what began as an "odd, Bondian episode" now promises to be the "scandal of the year."

Despite the fact that by now, The Washington Post had broken the whole story, and even the New York Times was formulating a mild position of distrust, Time took no position and gave but short coverage on September 4 to the Democratic call for a special prosecutor. On September 11, 1972, Time did little more than note the Attorney General's announcement that Watergate had received "the most extensive, thorough, and comprehensive investigation since the assassination of President Kennedy." On September 18, 1972, the report of the first indictments was entitled "Some Political Sparks but Still No Fire," and in it, Time obviously took a "hands-off" position, indicating that the indictments "will in effect stifle the Democrats' charges" because they do not point any higher than the "middle echelons of the Committee for the Re-election of the President." Time did not mention the charges in the Washington Post and seemed quite content to let the matter drop. September 18 and 25, it noted the concern of the Democrats that a national disgrace was being hidden, but concluded that while the initial indictments "failed to explain the motives," the resultant court cases, the slowness of the courts, and the confusing nature of the litigation made it seem "likely the Watergate battle will switch to Capitol Hill." The next two issues of Time ignored Watergate and focused on the lopsidedness of the campaign.

These two weeks were not, however, quiet ones in the editorial offices; attitudes at Time were changing, and by October 16, Time was ready to join the Post and the Times in attacking the public's indifference. In a stunning Time essay, High Sidey and Lance Morrow lamented the "first documented case of political espionage in our history" and the failure of the president to provide "moral leadership." Their special focus, however, was on the relation between public, press, and presidency: "The public does not seem to be in a damning mood. Here the anger at the press and TV enters the picture. Too long have the messengers brought the bad news. People do not want to listen to it, let alone get sore about it." Time, they indicated, had done an extensive poll and discovered that 75 percent of the voters in sixteen states were tired of a negative press. As High Sidey and Lance Morrow saw it, the message in this election year was clear: "a plague on the messengers, never mind the facts." The October 23rd issue of Time, one of the most courageous in its history, continued the attack with a cover feature on the "National Disgrace: the Forty Million Dollar Election." In this issue, Time editors mused that the entire issue of dirty tricks might be "swept aside in a Nixon triumph." Their speculation became fact as the administration launched a massive attack on the media, including Pat Buchanan's charge that they were "politically motivated" and Mr. Ziegler's charge that all the stories were based on "hearsay, character assassination, innuendo, and guilt by association." Then came the rumors of a peace which was right at hand, and finally a landslide election. Watergate quickly dropped from the pages of Time, and the year ended with cover stories on American Wine, Liv Ullman, the Super Bowl, Eating and Health, and Holiday on Skis.

Even given this rather poor showing by the New York Times and Time magazine, phase one of Watergate is a fine moment for the American press and especially for the Washington Post. Without the daring of the Post and the eventual pressure from the Times and Time, public knowledge of the Watergate might have ended with the image of an "odd, Bondian episode."

The achievements of the press make the failures of television journalism during the early phases of Watergate all the more frightening. Edwin Diamond and the members of the Network News Study Group in the department of political science at M.I.T. carefully analyzed the national television coverage of Watergate during the 1972 campaign, and the conclusion of their study was that the fifty million people who watched television news received a "fairly straight serving of headlines from the Post and other newspapers. There was little original reporting on any network and almost nothing that could be called investigative reporting."[7] Even discounting the failures in originality, there is little that can be said for television news; it was, in the words of Mr. Diamond and his associates, "superstraight, superjudicious coverage." If the coverage was bad qualitatively, it was also very short in quantity on two of three networks. CBS in the seven weeks beginning September 14 devoted seventy-one minutes, nine seconds to the investigation, while ABC used only forty-two minutes, twenty-six seconds, and NBC, forty-one minutes, twenty-one seconds. The implications of Mr. Diamond's calculations are overwhelming: television viewers were failed miserably by the networks.

The reasons for television's failures were manifold. Gabe Pressman, a respected New York newsman, speculated in an address to the Television Academy's New York Chapter that television "virtually laid off" the Watergate story until it overwhelmed them because "television has yet to develop a strong investigatory tradition" and because "of a basic timidity that developed during the years immediately after Vice President Agnew's highly critical remarks."[8] Sad as it is to say, television was not equipped to explore the Watergate story, and was too beleagured to confront the administration. Television news was badly hurt by the administration's attacks: viewers actually dropped from 1968 to 1972 despite the increase in television sales. Compounding this decline in audiences were threats of antitrust actions and more stringent prime access rules. The power of the censors can best be seen in the one example of a network trying to confront Watergate. In the last week of the campaign, CBS scheduled a two-part report on Watergate. Edwin Diamond reports that after the first part of the report, White House aide Charles Colson angrily phoned CBS chairman William Paley. The second episode, reportedly planned to run fifteen minutes, ran eight minutes; CBS, Diamond notes, denies that the Colson call influenced the follow-up.

After the landslide victory of the Republican candidate, Watergate disappeared almost completely from press and television, though part of the administration's counterattack was to leak inaccurate stories to the press. As Les Evans and Allan Meyer note in their text Watergate and the Myth of American Democracy, the only major Watergate story in the month after the election was "planted" in the Post by the White House; the story alleged that McCord had recruited the burglars, an obvious attempt to keep the pressure off higher-ups.[9] The public meanwhile seemed thoroughly bored with the Watergate affair. The crucial turn in events came in the Federal Court of John Sirica, who urged the principals to reveal what they knew. James McCord wrote his famous letter early in 1973, and the whole focus on Watergate shifted from what happened before the break-in to what happened after the break-in; cover-up was the key word, and a bizarre tale of clandestine operations, dirty tricks, and hush money emerged, making the earlier Post revelations seem a rather insignificant tip on a hugh iceberg. The media had its finest hour during the spring and early summer of 1973; the Post had been vindicated, and the rest of the press came out from hiding and joined the war.

All the media were engaged in uncovering the plot to conceal Watergate. Especially notable, however, were the two weekly news magazines, Time and Newsweek, which featured Watergate stories on three or four covers each month. If the press had been overwhelmed by the administration in the post election period, the new year with the McCord leak and subsequent revelations put it in its most powerful position ever vis-a-vis the administration. Elizabeth Drew noted in her "Watergate Diary" that the press became "a kind of moral arbiter in this whole affair."[10]

Spurred largely by the widespread revelations and editorials, a Senate Select Committee on election practices was formed and public hearings were set. The major focus shifted from what had happened and who was responsible to a broader question of what was to be done about the scandal and how future scandals were to be avoided. Congress assumed the real power, and the press was reduced to reporting the facts the Congress uncovered and to reporting Congressional hearings.

Television coverage of the Watergate hearings proved to be the surprise hit of the summer; as Variety noted in a banner headline, "Ervin and Co. /are/ Soaking the Soaps." Public television found its evening recap of Watergate its most popular program ever and an unexpected source of funds. By July 8, 1973, 71 percent of the American public believed that Nixon either knew about the actual break-in or participated in the cover-up.[11] The media's point had been made. In the summer of 1972 less than half the people in the United States had even heard of Watergate; by the summer of 1973 almost two thirds believed Nixon was criminally involved in either the break-in or the cover-up. Soon the President would be forced to appear nationally

with the pathetic and self-condemning declaration "I am not a crook," which declaration was, in turn, emblazoned on the cover of Newsweek.

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The rest of Watergate is largely the history of legal and constitutional processes at work. The appointment of a special prosecutor, the Saturday Night Massacre, the new prosecutor, his successful appeal to the Supreme Court, the convening of a Judiciary Committee hearing on impeachment, the bill of impeachment, the impeachment itself, and the Senate trial—these are part of the public record thanks largely to the labors of the mass media. The press chronicled these later phases of Watergate professionally and editorialized eloquently, but it was the earliest phases of Watergate that were so special. They constituted the most challenging period in the history of American journalism, and the press acquitted itself well, quite well indeed.

FOOTNOTES

[1]James Keogh, President Nixon and the Press (New York, Funk and Wagnalls, 1972), 43.

[2]Carl Bernstein and Bob Woodward, All the President's Men (New York, Simon and Schuster, 1974), 224.

[3]Edward Jay Epstein, "Did the Press Uncover Watergate," Commentary, (July 1974), 22.

[4]New York Post, (July 25, 1973), 39.

[5]James Brady, "New York Intelligencer," New York, (June 11, 1973), 72.

[6]Elizabeth Drew, "A Watergate Diary," Atlantic, (August 1973), 60.

[7]Edwin Diamond, "TV and Watergate: What Was, What Might Have Been," Columbia Journalism Review, 12 (July-August 1973), 20.

[8]Variety, (June 27, 1973), 42.

[9]Les Evans and Allen Myers, Watergate and the Myth of American Democracy (New York, Pathfinder Press, Inc., 1974), 63.

[10]Drew, 66.

[11]New York Times, (July 8, 1973), sec. 1, 23.

ON CITIZENSHIP AND TECHNOCRACY

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> The individual is always ready
> to submit to necessity, as long
> as freedom's vocabulary is preserved,
> so that he can equate his servile
> obedience with the glorious exercise
> of a free personal choice.
> Jacques Ellul

INTRODUCTION

The designers of democratic institutions have long held that, among the many requirements, this particular model should include these three basic constructs: (1) an informed public, (2) alternatives of direction, and (3) a means of expression. It was reasoned that the citizen must find these constructs actually to be existing in his political reality if his democratic spirit was to be realized. He was expected to use his consciousness and his intelligence to determine the difference between reality and illusion.

With the benefit of hindsight, the mythical justice of the 19th century political aristocracy is all too apparent. But why stop here? What realizations have we come to that preclude the possibility that 20th century democracy is fundamentally mythical as well? What assurances do we have that our era will be the first civilization to be called a-mythical?

No historical review of any era is complete without a discussion of the operating myth structure that formed the basic fabric of the belief system. Traditionally, we find myth delivering man's religious beliefs, filling the voids of his uncertainty and giving comfort to the disquiet of his inner self. While on the corporal level, he has mythologized his politics to the point where he believes that the state can and "must assure social justice, guarantee truth in information, and protect freedom. The state as creator and protector of values--that is the business of politics."[1]

Malinowski notes that myth is used "to account for extraordinary privileges or duties, for great social inequalities, for severe burdens

of rank, whether this be very high or very low; in short for sociological strain."[2] "Clearly these are the very bases for potential resentment which our myths about close popular control over political institutions, account for and moderate. Without them the inequalities in wealth, in income, and in influence over governmental allocations of resources can be expected to bring restiveness; with them, potential rebellion is displaced by 'constitutional' criticism or approval."[3]

While man succeeded, to some extent, in demythologizing his spiritual beliefs, he never-the-less found himself struggling to find solutions to such problems as peace and personal freedom through political means. "Paul Johann Feuerback's perfectly convincing proof of God can today be transferred to the subject that has taken God's place in modern man's conscious, i.e., the state. The motives, the processes, the mysteries that made man accept religion and expect God to accomplish what he was unable to do, lead him nowadays into politics and make him expect these things from the state."[4]

However, today's biological revolution runs counter to the Augustinian notion of a secularized nature, which gave the "things of this world a monopoly of evil and visited the heavenly city with a monopoly of virtue."[5] Thus, the imperatives of today's worldview demanded a resanctification of life and nature. Heeding the command, 20th century man denounced the Christian heresy and brought his myth-laden concept of heaven down to earth. He sought his salvation in this life and attempted to turn his politics into a neo-theocracy where "God descends from the heavens to live and work among men; where God becomes the essence of peace and freedom, but especially of democracy; the symbol of a democratic theocracy in which the principle of the holy is infused throughout culture."[6] "The creation of an etiological myth leads to an obligation on the part of democracy to become religious. It can no longer be secular but must create its religion. The content of this religion is of little importance; what matters is to satisfy the religious feelings of the masses; these feelings are used to integrate the masses into the national collective. We must not delude ourselves: When one speaks to us of 'massive democracy' and 'democratic participation,' these are only veiled terms that mean 'religion.' Participation and unanimity have always been characteristics of religious societies, and only of religious societies."[7]

"Among the many basic definitions of man, two are joined together at this point: homo politicus is by his very nature homo religiosus. And this faith takes shape in active virtues that can only arouse the jealousy of Christians. Look how full of devotion they are, how full of the spirit of sacrifice, these passionate men who are so obsessed with politics."[8] Yet there was no respite from the plaintive cries of mass inequities. Twentieth century man found the rhetoric of his democracy as vague as if he were confronting the Delphic Oracle. But why should this be so? It is precisely because 2,000 years later he

had no democracy! He had a neotheocracy to be sure, but it has come to be ruled by the technocrat.

How did we come to such a curious state of affairs? Perhaps it is because we have failed to meet the primary requirement of the democratic citizen: We have not used our consciousness and our intelligence to determine the difference between reality and illusion. We have come to accept an illusion of democracy for the thing itself.

Let us re-examine these three fundamental constructs of our democracy, with this prime requirement in mind, and see if we can't separate fact from fancy.

I

The question of an informed public, in the democratic state, presents a classic dilemma. Jacques Ellul believes that, "On one fact there can be no debate: the need of democracy, in its present state, to make propaganda. (Emphasis mine.) Historically, from the moment a democratic regime establishes itself, propaganda establishes itself alongside it under various forms. This is inevitable, as democracy depends on public opinion and competition between parties. In order to come to power, parties make propaganda to gain voters."[9] On the other hand the democratic citizen cherishes his belief that he gets first hand reportage of events free of biased editorial censorship. The citizen keeps a watchful eye on the news media in order to insure his right to know the facts as they happen.

In the area of political activity, the media's information and data must, of course, originate with the source, which is the state itself. Returning to Ellul's notion above; that the party must produce propaganda as a necessity to the internal life of a democracy, it becomes clear that the information disseminated by the state must suffuse the facts of events with the official party line. Ellul goes on to say that, "This state-proclaimed truth must be all-embracing. The facts, which are becoming more and more complex are covering larger segments of life; thus the system into which they are arranged must cover all of life. This system must become the complete answer to all questions occurring in the citizen's conscience."[10] Thus the democratic state itself becomes a mechanism of propaganda not so much because of malice or avarice, but simply because of the inherent requirements of the adversary party system. This, of course, is a profound departure from the constitutional and ideological framework of the classical democratic model. The citizen's right to know is thereby abridged in the management, editing and censorship of political events, by the state.

Using the armed conflict in Vietnam as just one example, we find "that many of those who challenge(d) the facts as presented by the President were interpreting events without the benefit of information

available only through official channels. This is one of the oldest of diplomatic dodges. And history testifies that precedent (was) on Mr. Nixon's side; most American presidents have found it expedient to cozen their constituency when faced with the necessity of rallying popular support for an arduous course running counter to popular desires."[11] It would appear then, that in this instance, expediency and democracy are mutually exclusive terms. Frank Herbert writes, in The Santaroga Barrier, that "the 'outside' works on the temporary expedient. You must know that. And the temporary always turns into the permanent, somehow. The temporary tax, the necessary little war, the temporary brutality that will cease as soon as certain conditions end . . . the government agency created for the permanent interim. . . ."[12] The expediency of censorship; information available only through official channels; courses running counter to popular desires; an informed public?

II

Considering the second construct, alternatives of direction, leads us to a discussion of another aspect of propaganda in a democratic (technocratic) society.

In today's technological world of external competition and internal pressure, efficiency has become the primary aim: efficiency has become the sole criterion of a government's legitimacy. "Thus we can formulate another construct with regard to contemporary political affairs: efficiency renders our choices more limited. The political man cannot choose between what is more or less efficient. The choice is made independently of him. Because he may err in evaluating a situation, he must take recourse to men who are more competent than he, and place the choice in the hands of technicians."[13] We would do well to note "that the study of propaganda must be conducted within the context of the technological society. Propaganda is called upon to solve problems created by technology, to play on maladjustments, and to integrate the individual into a technological world. In the midst of increasing mechanization and technological organization, propaganda is simply the means used to prevent these things as being felt as too oppressive and to persuade men to submit with good grace."[14] More important than official government propaganda is the phenomena of "sociological propaganda: the group of manifestations by which any society seeks to integrate the maximum number of individuals into itself, to unify its members behavior according to a pattern, to spread its style of life abroad, and thus to impose itself on other groups."[15]

This style of persuasion expresses itself in a multitude of ways: in advertising, in motion pictures, in television, in technology in general, in education, in publications, and in social services, casework, and settlement houses. Although seemingly unintentional, all these activities act in concert to create a general conception of society. The American Way of Life. The propagandistic nature of this

phenomenon is seen firstly in comparison to traditional "political" propaganda's mechanisms: use of stereotypes and prejudices, and the stirring of emotional feelings to promote action. And secondly, in the end, the action is integration; conformity; the need to present a unified front. Just as with intentional "political" propaganda, the result is the propagation of behavior and myths; the indoctrination of the individual as to what is good and what is bad. Thus the whole social fabric interacts to cause its citizens to express the same basic notions and to adopt a particular way of life. Totally immersed in the social context, the citizen emerges with a fully established personality structure. His beliefs, his attitudes, his ethics, indeed his perception of the world is a product of his symbolic environment. The result is that the actual condition of man's life matters little. As long as he thinks he is indisputably well off, then his "way of life" becomes the basis of his values. Quite naturally the citizen who uses a "way of life" as a criterion of good and evil is led to make judgments in consonance with this pre-established reality.

As the American Way of Life is marketed to the world as the crowning achievement of civilized man, so it also appears to its citizenry. It follows then, that "everything that expresses this particular way of life, reinforces it and improves it, is good; everything that tends to disturb, criticize, or destroy it, is bad."[16]

In this framework there can be no true alternatives of direction, for the citizen is truly psychologically barred from even perceiving alternatives that run counter to his belief systems. In this framework his alternatives are illusions, for the end is a foregone conclusion and the rhetoric of means merely a mandrake.

III

Moving to the third and last construct, means of expression, we will try to determine the actual extent to which we, through our ballots and our elected representatives, control the direction of the state.

In his work, The Political Illusion, Jacques Ellul "rejects the idea that in democracy as we know it 'the people' control the state with their ballots. They do, he says, control to some extent who is on top of the pyramid, but that does not mean control of the state. The elected representatives have no way of controlling--or even thoroughly knowing--the behemoth beneath them."[17]

Perhaps a brief review of recent French history, as a model, will help to put this notion into perspective. It will be recalled that feudal society was made up of numerous political decision centers. The local powers were autonomous and met their own needs--by their own means and were largely responsible to themselves. However, the multiplicity of rights and rulings caused disorder and incessant

conflicts with resulting disadvantages for the population. Convinced that the only solution to the strife was singleness of the center of decision, the King moved in that direction. After all, in the human body the brain was the will's one and only center. Behind the monarchic view, that nothing in the nation could function properly unless there was one and only one method for making decisions, the doctrine of centralism emerged. A new order was envisioned in which all existing political institutions became the instruments of the central will. Authoritarianism began its rise as both a product and a device of implementing centralism.

At about the same time another philosophic notion, rationalism, was beginning to make its presence known. The doctrines of Spinoza and Descartes were applied to politics with the belief that law and the state must be based on reason and rationally organized. Nature, whose rational character was discovered by the science of the time, became the model. Rational political institutions would conform to nature, and hence, be more just and more efficient. Surely, political problems could be reduced to mathematics. "From then on, administrative units were to become abstract and to turn into perfectly rational organizational systems; and corresponding theories were propounded. The aim was to construct a perfectly coordinated machine, single, hierarchized, and cohesive, in which the human element would be reduced to a minimum; to establish a mechanical administration that was anonymous and would eliminate every element of chance afforded by ideas, passions, sentiments, or personal interests."[18]

These events were not the work of Machiavellians, but rather the fruit of practical, efficient, and reasonable men seeking to make the state apparatus as efficient as possible.

In the face of rationalism as the pervasive worldview, the French revolution came and went. While constitutional theories were modified, a ruling social category abolished, and one form of politics substituted for another, nothing fundamental in the course of political power changed. The transition from the monarchy of Louis XIV and Richilieu to the republic of the Jacobians and the Directory did not effect the growing trend toward rationalism's requirements of centralism and authoritarianism. The organic development of the French state continued virtually unaware of the titular changes.[19]

Thus, just as rationalism demanded the creation of the centralized/authoritarian state, so too, the growth of science, the pressures of a geometrically increasing population, and the industrial revolution provided the fuel to continue the growth to a technological bureaucracy, a technocracy.

Theodore Roszak, writing in The Making of a Counter Culture, describes the technocracy "as that society in which those who govern justify themselves by appeal to technical experts who, in turn,

justify themselves by appeal to scientific forms of knowledge. And beyond the authority of science, there is no appeal."[20] Roszak goes on to say that "within this technocracy, the citizen, confronted by bewildering bigness and complexity, finds it necessary to defer on all matters to those who know better."[21]

But what has the foregoing to do with the validity of the ballot as a means of expression; as an instrument of change? It is simply employed in an effort to illustrate that to change those in office is to change nothing. "In the present generation, it is the 2nd and 3rd level figures like McNamara who are apt to be the technocrats par excellence: the men who stand behind the official facade of leadership and who continue their work despite all superficial changes of government. McNamara's career is almost a paradigm of our new elitist managerialism: from the head of Ford to head of the Defense Department to head of the World Bank. The final step will surely be the presidency of one of our larger universities or foundations. Clearly it no longer matters what a manager manages; it is all a matter of juggling vast magnitudes of things: money, missiles, students. . . ."[22]

The course of events may be said to have been pre-determined by the mandates of efficiency and competition, and while the elected representatives serve to provide the citizenry with an illusion of control, the technicians and experts are left to their rationalistic manipulations, free of censorship, interference and control.

RETROSPECTIVE

In review then, we may find that the realities of our basic constructs for democracy are only a kaleidoscope of interlocking illusions.

An informed public? In the presence of censored, edited, and managed information?

Alternatives of direction? In the presence of a programmed culture?

Means of expression? In the presence of an omnipotent bureaucracy?

Further, the investigation has yielded, among other things, a manifest antagonism between technology and human freedom. "Any culture which, in the interests of efficiency or in the name of some political or religious dogma, seeks to standardize the human individual, commits an outrage against man's biological nature."[23] So long as efficiency remains the end, standardizing and uniformity will continue to be the means. As long as efficiency is believed to be the panacea for all the maladies of the human condition, co-existence

for technology and freedom will continue to be purely a myth. In this milieu democracy will continue its evolution to the neotheocracy; 20th century man's contribution to the pan-history of the myth. The neotheocracy, like all previous religions, promises the road to true happiness, true equality, true justice, and in fact, to true truth! It offers certainty through efficient institutions: not just plain human justice, but institutionalized social justice; not just plain human equality, but institutionalized equal protection of the laws; not just plain truth, but institutionalized exactness with regard to fact! In an era where all problems are approached from the standpoint of efficiency, the engineer, technician and expert would be the gods. Technical efficiency for increased production ultimately implies human engineering for the control and management of dissent.

The resolution of this conflict seems to reside in the realm of beliefs. Democracy, simply, is not an efficient regime and until man can begin to come to terms with the possibility that merit may exist in spite of inefficiency, he will continue to exist in a political illusion. What event is necessary to cause him to begin to question the validity of efficiency as a guiding life force; as a value to be achieved by any means; indeed, as an attitude and basic moral posture? While efficiency is the ultimate goal, all other arteries of human effectiveness will atrophy.

On demythologizing politics and achieving true democracy, Jacques Ellul writes, that "to me this appears to demand a more genuine approach to democracy—which seems to me possible only by a reformation of the democratic citizen, not by that of institutions."[24] And Aldous Huxley has noted, in Brave New World Revisited, that the "first condition of a genuine democracy is that it foster responsible freedom within small self-governing groups."[25] Responsible freedom implies that requirement expressed on the opening page of this document: If man wishes his democratic spirit to be realized, then he should constantly survey his political reality, with his consciousness and with his intelligence, and endeavor to determine the difference between that which is reality and that which is illusion. He should be alert to the forces and the temptations that would drain off the energies of consciousness and intelligence and divert them into mindless compliance with the status-quo. In short, if man is to find some value in the collective life, then the responsibility to the ideals of human dignity is his and his alone. If he abdicates this responsibility, by delegating it to another, or by accepting the promises of some efficient agency, he then, in effect, gives up this model entirely, and should not be surprised to find himself the taxpayer of an altogether different political reality.

FOOTNOTES

[1]Jacques Ellul, The Political Illusion, (New York, 1967), 186.

[2]Bronislaw Malinowski, Magic, Science, and Religion and Other Essays, (New York, 1948), 64-103.

[3]Murray Edelman, The Symbolic Uses of Politics, (Chicago, 1967), 18.

[4]Ellul, Political Illusion, 187.

[5]Harvey Wheeler, "The Phenomenon of God," The Center Magazine, IV, No. 2 (1971).

[6]Ibid.

[7]Jacques Ellul, Propaganda, (New York, 1966), 251.

[8]Ellul, Political Illusion, 21.

[9]Ellul, Propaganda, 232.

[10]Ibid., 251.

[11]Harry Ashmore, "The Policy of Illusion, The Illusion of Policy," The Center Magazine, III, No. 3 (1970).

[12]Frank Herbert, The Santaroga Barrier, (New York, 1968), 189.

[13]Ellul, Political Illusion, 36.

[14]Ellul, Propaganda, xvii-xviii.

[15]Ibid., 62.

[16]Ibid., 67.

[17]Ellul, Political Illusion, ix.

[18]Ibid., xvii.

[19]Ibid., xiii-xxi, et passim.

[20]Theodore Roszak, The Making of a Counter Culture, (New York, 1969), 8.

[21]Ibid., 71.

[22]Ibid., 12.

[23]Aldous Huxley, Brave New World Revisited, (New York, 1958), 19.

[24]Ellul, Political Illusion, xi.

THE SUPREME COURT AND THE FIRST AMENDMENT: 1973-1974

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I. The 1973-74 Term in Review

The Supreme Court made little news with its First Amendment rulings until late June* when the justices handed down a half dozen cases involving free expression. Nevertheless, Warren Burger's court was active throughout the term, affecting the First Amendment by what it declined to take up along with those key cases singled out for certiorari, argument, and decision.

In a Massachusetts case the Court chose not to regard a flag sewn on the seat of trousers as symbolic and thus protected communication, but in a Washington case they found flag misuse to be protected expression when there is no risk of breach of the peace. In other cases, the Court reiterated a previous position that a local ordinance could not be so broad as to exceed the Chaplinsky "fighting words" definition; announced that local standards for defining obscenity are permitted but not required; declared that a group which advocates violent overthrow as abstract doctrine may not be denied a place on an election ballot; insisted on demonstration of a substantial governmental interest as a condition precedent to permissible censorship of a prisoner's mail; granted newsmen no constitutional right of access to prisons or their inmates beyond that afforded the general public; declared political advertising to be unprotected expression on public transit vehicles; and held that a Florida "right-of-reply" statutory guarantee violates freedom of the press.

II. Areas of Special Interest

Symbolic Speech

Alleged flag desecration and the enforcement of state flag abuse laws have presented perplexing problems for the high court during the recent court term. On the docket were seven flag cases from New York, Texas, Connecticut, Washington, Iowa, Massachusetts,

*Case citations for the 1973-74 Supreme Court term do not appear in this article because they are not assigned until a time subsequent to the preparation of this material.

and Illinois. Flags were burned in protest against government policy, draped obscenely in an art gallery, used to absorb the discharge from a protestors nose, and sewn on the seat of pants.

Since all states have statutes prohibiting flag defacing or contemptuous treatment of the flag, it was inevitable that protestors and state laws would come into conflict and produce sticky cases for Supreme Court resolution. Essentially the issue taken to the Court has been whether use of the national symbol to dramatize a protestor's concern is protected from prosecution because he exercised his First Amendment right of free speech.

Cases have been appealed to the Supreme Court by:

1. three young women (in Rock Island, Illinois) who were fined and given probated sentences for burning a small flag. They burned the flag, they claimed, because it was literally dirty and "it was dirty with blood from Southeast Asia and blood from the students killed at Kent State." Issues certified to the Supreme Court were:

   Does state prosecution for peaceful and symbolic communication of ideas through flag burning violate the First Amendment?

   Can guilt for a criminal act be found when there is no breach of the peace and such breach is the traditionally declared purpose of the statute?
   (Pending. Sutherland v. Illinois. 292 NE 2d 746, 42, LW 3273.)

2. Patricia Farrell, a former University of Iowa student, who was fined in Iowa City for burning a flag during a campus demonstration against the Vietnam War. Flag desecration even though defended as a symbolic act of political protest was prohibited uner Iowa Law. The court disallowed claims that Iowa law prohibits constitutionally protected conduct and is innocuous to legitimate state interests. The Supreme Court was asked to decide if flag burning, as a symbolic act of political protest, is protected speech and if the flag desecration statute is an overbroad regulation of First Amendment rights?
   (Pending. Farrell v. Iowa, 209 NW 2d 103, 42 LW 3337.)

3. a former Rice University student who received an eight-year suspended sentence in Houston following testimony that he blew his nose on the flag, rubbed his genitals on it and set it on fire at a rally protesting the Cambodia invasion in 1970. After conviction under a Texas flag desecration statute which applies to "hard core" desecrators the alleged violation of First and Fourteenth Amendment rights became the issue before the court.
(Appeal Dismissed. Van Slyke v. Texas. 489 SW 2d 590, 42 LW 3021.)

Smith v. Goguen (42 LW 4393)

Two of the appealed cases have resulted in formal opinions by the Court. The flag contempt case of Smith v. Goguen has proven more curious than controversial as a result of the arguments chosen for inclusion in the majority opinion of the Supreme Court.

Valorie Goguen was convicted for violating a Massachusetts flag misuse statute which made liable anyone who "publicly treats contemptuously the flag of the United States." Goguen's prosecution resulted from a small U.S. flag sewn on the seat of his trousers and publicly displayed. Although the state supreme court affirmed the conviction, the federal appellate court held the flag contempt portion of the Massachusetts statute "impermissibly vague under the due process clause of the Fourteenth Amendment as well as overbroad under the First Amendment."

The Supreme Court with Justices Blackman, Burger, and Rehnquist dissenting held the contempt provision of the flag misuse statute unconstitutionally vague and overbroad. However, they did not affirm the lower court on any First Amendment grounds choosing not to regard the flag as symbolic and protected communication. The Court majority acknowledge that since contemporary fashions allow for some informal and unceremonious use of the flag, the Massachusetts statute fails to draw clear lines between those kinds of nonceremonial flag treatment that are criminal and those that are not.

Justice Rehnquist predicated his dissent on the belief that Goguen could not have treated the flag contemptuously without having expressed any idea at all. Thus Rehnquist found marginal elements of "symbolic speech" in Goguen's display of the flag but contended that this was not protected expression. Prohibition from impairment of the physical integrity of a unique national symbol was regarded as a legitimate right of Massachusetts and took precedence over "abstract, scholastic interpretations" of the First Amendment.

Spence v. Washington (42 LW 5148)

The appellant displayed a privately owned U.S. flag from his apartment window. A large peace symbol fashioned of removable tape was affixed to both sides of the flag. The appellant subsequently was convicted under a Washington statute which forbid the improper use of the flag. Appellant in his own defense admitted that he put the peace symbol on the flag and publicly displayed it in protest to the invasion of Cambodia and the Kent State University killings. His purpose, he claimed, was to associate the flag with peace rather than war or violence.

Although the Washington Court of Appeals reversed the conviction because the Washington "improper use" statute was held invalid under the First Amendment, the Washington Supreme Court reinstated the conviction.

The U.S. Supreme Court reversed the conviction contending that the application of the Washington statute to the appellant impermissibly infringed protected expression. The Court took note that the flag was owned privately, displayed on private property, and displayed without breach of the peace. Since the context of use may give meaning to the symbol, the context in which this symbol was used for purposes of legitimate expression became important to the Court. The Court, majority concluded that "given the protected character of his /Spence's/ expression and in light of the fact that no interest the State may have in preserving the physical integrity of the privately-owned flag was significantly impaired on these facts, the conviction must be invalidated."

Justices Burger and White joined in Justice Rehnquist's dissent. Rehnquist disagreed with the claim that the First Amendment prohibits state restrictions on activity which is in furtherance of other important interests. In this case Rehnquist defined the state's interest as preserving "the physical integrity of the flag" and "preserving the flag as an important symbol of nationhood and unity." The state, he claimed, merely withdrew a unique national symbol from those things which constitute protected communication.

Schools

Roth case

When the case of Daniel Roth /(408 U.S. 564); Free Speech Yearbook (1972), 100-101/, an assistant professor at the University of Wisconsin (Oshkosh) who was fired after criticism of the university administration, reached the Supreme Court in 1972, the only issue presented was whether Roth had a constitutional right to a statement of reasons for his dismissal and a hearing. Roth lost that appeal but recently won round two with the claim that his freedom of speech was violated.

Roth had publicly criticized the administration for suspending a group of students without determining individual guilt. Subsequent to characterizing officials as authoritarian and autocratic Roth was fired. Although the Supreme Court without resolving the free speech issue held that Roth lacked a sufficient property interest in his job and thus was not deprived of procedural due process, a federal jury this past year awarded Roth $6,764 in damages because the university administration violated his free speech. Three Oshkosh administrators were ordered to pay Roth punitive damages from their own funds because they acted "recklessly or maliciously for the purpose of silencing Roth."

Subject to a final review by the Supreme Court the case so far seems to say that administrators may not fire a teacher for exercising the right of free expression; and when they interfere with this right, they are personally liable for damages which they cause. Personally assessed punitive damages under these circumstances is precedent setting, and the Roth case has not likely experienced its last day in court.

Meinhold case

In October the Supreme Court by refusing to hear the case of a Nevada public school teacher let stand the teacher's dismissal for private comments made to his family. The inescapable conclusion is that until the Court holds otherwise a teacher's right to teach cannot depend solely upon conduct in the classroom.

Alvin R. Meinhold after seven years of service was discharged for "unprofessional conduct" because he privately stated to his own children in his own home that he did not believe in compulsory school-attendance laws. Meinhold did not express his views in the classroom nor encourage his students to be truant. Nevertheless, the Nevada Supreme Court ruled that "a teacher's right to teach cannot depend solely upon his conduct in the classroom" and upheld the firing.

Justice Douglas, who wanted the Meinhold case reviewed, cited a previous court opinion which contended that teachers may not "constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens" (42 LW 3223). Douglas cited a more explicit exercise of dissent which the court protected in Pickering v. Board of Education, 391 U.S. 563 (1968) where a teacher criticized school policies in a letter to the local newspaper. Douglas concluded, "May Pickering publish his criticisms in the local newspaper with impunity while the petitioner must keep his views secret from his children, lest they adopt them?"

In addition to the Meinhold case the court either declined to hear the following cases, thus allowing the lower court decision to stand, or has yet to act.

Ruling below: No constitutional rights were violated by university officials who canceled a film with a scene which depicted a housefly crawling over a nude female lying on her back. Issue: Does the cancellation of a film to be shown as part of a joint student-university educational and cultural program constitute lawful governmental censorship? (Certiorari denied. Associated Students of Western Kentucky University v. Downing. 475 F 2d 1132.)

Ruling below: Disciplinary action by school authorities was proper where a student flagrantly disregarded established school regulations with respect to sale and distribution of student publications. Issue: Does a school district violate the First Amendment when it requires prior to distribution on or near school premises that all written materials be submitted to school officials? (Certiorari denied. Sullivan v. Houston Independent School District. 475 F 2d 1071.)

Ruling below: A state university is acting constitutionally when it expands mandatorily assessed student fees to support a student newspaper, student association, and speaker's program. Issue: Are a student's First Amendment rights to free speech and association violated by a mandatory student fee which conditions admission to his own state university and which is used to support presumed freedoms under the First Amendment? (Certiorari denied. Veed v. SchwartzKopf. 42 LW 3232.)

Ruling below: An Oklahoma regulation prohibiting male students from wearing long hair in braids was held not to violate Pawnee Indian students' rights to free speech. Issue: Does a hair-length regulation unconstitutionally violate freedom of expression for those who traditionally wear their hair long and in braids and do so as an expression of pride in and identity with their racial-cultural heritage? (Certiorari denied. Rider v. Board of Education of Independent School District No. 1. 42 LW 3232.)

Ruling below: General damages against administrators were disallowed when in good faith and without malice they terminated the employment of an associate professor who was recommended for termination in reprisal for the exercise of protected expression under the First Amendment. Issue: Is a college professor whose employment at a state college was terminated in violation of his constitutional rights entitled to compensation not only for salary and expenses but for humiliation, injury to reputation, and disruption of career plans? (Pending. Smith v. Losee. 42 LW 3364.)

Ruling below: A state university may not interfere with publication and distribution of a student literary magazine with "four letter words" not used in a sexual sense but to convey mood. Issues: Do students have a sufficient proprietary right in a departmental magazine to require that articles be published therein? Does the First Amendment require a state university to publish all articles submitted or may it exercise the discretion allowed publishers of private magazines? (Pending. Fortune v. Bazaar. 42 LW 3504.)

Issue: Are students exercising constitutionally protected expression when they distribute literature which containing earthy words relating to bodily functions and sexual intercourse might produce significant disruption of normal educational process? (Pending. Board of School Commissioners v. Jacobs. 42 LW 3546.)

Ruling below: The constitutional rights of students and faculty were not abridged by the application of a Georgia criminal trespass statute which was applied when they presented a protest petition to the university president and disrupted employees when on request they refused to leave. Issue: Does a state trespass statute which does not distinguish between public and private property deny students and faculty free expression rights on the property of a state institution? (Pending. Alonso v. Georgia. 42 LW 3613.)

Fighting Words

Lewis v. City of New Orleans (42 LW 4241)

The Supreme Court in 1972 remanded the Lewis case, 408 U.S. 913, back to Louisiana for reconsideration in view of Gooding v. Wilson, 405 U.S. 518. The appellant had been convicted of violating a city ordinance making it unlawful "to curse or revile or to use obscene or approbrious language toward or with reference to" a police officer in performance of his duties. Gooding v. Wilson necessitated that the Louisiana Supreme Court narrow and define the terms of the ordinance so that their broad sweep would not exceed the constitutional definition of "fighting words" as announced in Chaplinsky, 315 U.S. 568 (1942). Nevertheless, the Louisiana court took the position that the ordinance was narrowed to fighting words uttered to specific persons at a specific time and, despite the Supreme Court recommendation, the appellant's conviction was affirmed again.

In a 6-3 decision with Blackman, Burger, and Rehnquist dissenting the Supreme Court reversed the decision of the Louisiana court and held the ordinance overbroad and facially invalid under the First and Fourteenth Amendments. Justice Brennan, who delivered the opinion of the Court, declared the ordinance to be equally "susceptible of application

to speech, although vulgar or offensive, that is protected" by the constitution. The fear enunciated in Gooding v. Wilson was restated: "Persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." The potentiality for abuse by a statute which receives a virtually open-ended interpretation necessitated reversing the judgment of the lower court. The overbroad ordinance on its face and not the appellant's conduct was held to constitute the standard for guiding conduct.

The dissent referring to findings of statutary "overbreadth" and "vagueness" called these "result-oriented rubberstamps attuned to the easy tne imagined self-assurance that 'one man's vulgarity is another's lyric.'" The dissent found the uttered speech to be "plainly" profane, "plainly" insulting, and "plainly" fighting and thus within the reach of the ordinance.

The Lewis case, 1974, caused the judgment to be vacated for three other cases which were remanded for action consistent with the Lewis case:

Rosen v. California, (42 LW 3086)
Ruling below: When the defendant in protest of a police search of his person said "I don't have to stand for that fucking shit" and "I don't give a fuck," he could be punished under a state statute proscribing "offensive conduct."
Issue: Are provisions of a penal code which prohibit use of vulgar, profane or indecent language in a loud or boisterous manner within presence or hearing of women constitutionally valid?

Karlan v. Cincinnati, (42 LW 3321)
Ruling below: The defendant was properly convicted under a municipal code provision prohibiting conduct "with the intent to abuse or annoy any person." The defendant, when asked by police why he was tampering with a car, told police in a boisterous manner "I hate all of you fucking cops. . .get out of my way you fucking price-ass cops. . . ." Issues: Is a municipal code provision making it "unlawful for any person to willfully conduct himself or herself in a noisy, boisterous, rude, insulting or other disorderly manner with the intent to abuse or annoy any person" so vague and overbroad that it restrains freedom of speech? In particular is the restraint valid since it was applied to activity which occurred before the court narrowed the class of speech not entitled to constitutional protection?

Lucas v. Arkansas, (42 LW 3321)

Ruling below: An Arkansas statute which specified the kind of "fighting words" beyond protection of the First Amendment and which was narrowed to only "fighting words" by state court decision is constitutional. Issue: Is a state statute void for vagueness if it prohibits use of profane, violent, vulgar, abusive or insulting language which is calculated to produce anger or a breach of the peace?

Obscenity

In June 1973 a Supreme Court majority said that local standards of propriety should apply in determining what is obscene, and they removed the strict requirement that for a work to be judged obscene it must be found utterly without redeeming social value. National community standards for defining obscenity were abandoned in favor of local standards even if local standards varied from community to community and even if they conflicted. But in June 1974 another dimension was added to the confusion when the Court held unanimously that local standards are not invariably right and apply only when they result in the banning of patently hard core sexual conduct (in reality as perceived by the Supreme Court). The mere consideration of Jenkins v. Georgia (42 LW 5055) meant that the Court was, in effect, admitting that it had yet to escape from its unwanted role as the nation's chief censor. Nevertheless, the Jenkins case provided the Supreme Court with an opportunity to clarify and refine the obscenity standards first announced in Miller v. California, 413 U.S. 15 (1973).

Billy Jenkins was convicted in Albany, Georgia for showing the film "Carnal Knowledge." Jenkins' conviction occurred prior to the Miller decision and was based on the Memoirs test: 383 U.S. 413, 418 (1966) of appeal to prurient interest without redeeming social value, etc. The Georgia Supreme Court upheld Jenkins' conviction and the U.S. Supreme Court assumed jurisdiction.

Justice Rehnquist delivered the opinion of the Court in which Justices Burger, White, Blackman, and Powell joined. Rehnquist expressed agreement with the Georgia high court on a number of issues which allowed clarification of the Miller standards. Namely:

1. The Constitution does not require that juries be instructed to apply the standards of a hypothetical statewide community.

2. Miller permitted but did not require the use of local standards.

3. Miller holds that state juries "need not be instructed" to apply "national standards."

4. Instructions are proper when they direct jurors to apply "community standards" without specifying what "community."

5. In determining "contemporary community standards" a state has considerable latitude in framing an obscenity statute.

6. Miller does not permit the conclusion that "juries have unbridled discretion in determining what is patently offensive."

Rehnquist noted that the Miller case provided a few plain examples of what could be defined as patent offensiveness; and although such "did not purport to be an exhaustive catalog of what juries might find patently offensive, it was certainly intended to fix substantive constitutional limitations" on what could be declared obscene and thus unprotected expression.

Rehnquist further claimed that it would be at odds with the Miller case to find as patently offensive a defendant's depiction of a woman with a bare midriff, "even though a properly charged jury unanimously agreed on a verdict of guilty." Since the camera did not focus on actors at sexually critical moments, since "ultimate sexual acts" were only initimated, and since nudity alone was not enough to make material legally obscene under the Miller standards, "Carnal Knowledge" was declared not to be a "public portrayal of hard core sexual conduct for its own sake and for ensuing commercial gain" which was punishable under Miller.

Justice Brennan was joined by Justices Stewart and Marshall in an opinion which concurred in the reversal of Jenkins conviction. Brennan added, however, that as long as the Miller test remains in effect "one cannot say with certainty that material is obscene until at least five members of this Court applying inevitably obscure standards, have pronounced it so."

Justice Douglas reiterated his view that any ban on obscenity is prohibited by the First Amendment and thus he concurred in the reversal of Jenkins' conviction.

The Jenkins case appears to be a resumption of the case-by-case review which occurred before the Miller case amidst obvious disagreement about the definition of obscenity. In Jenkins the Court appears to be saying "we still can't define pronography to the satisfaction of everyone else but we will tell you what it is if we see it." The Court did precisely this in the companion case of Hamling v. U.S. (42 LW 5035).

Making it clear that they had not gone soft on obscenity, as reported in the press after the Jenkins decision, they upheld the conviction of William Hamling and five other defendants for mailing 55,000 copies of an advertisement for The Illustrated Presidential

Report of the Commission on Obscenity and Pornography. The obscene ad included pictures "portraying heterosexual and homosexual intercourse, sodomy, and a variety of deviate sexual acts."

After ruling that the defendants, although convicted prior to announcement of the Miller case standards, should nevertheless receive any benefit available from a change in the law, the Court as in Jenkins proceeded to elaborate on the Miller case standards:

1. The test for obscenity should be understood in terms of the "average person applying contemporary community standards."

2. Miller permits a juror "to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion the average person applying contemporary community standards would reach in a given case."

3. By rejecting uniform national standards the Court did not require as a constitutional matter the substitution of some smaller geographical area into the same sort of formula. Although a state could proscribe obscenity in terms of a statewide standard, they need not.

4. A lower court could admit evidence of standards outside the trial area if such would assist the jury in resolving issues which they were to decide.

5. Nothing in the 1973 tests for obscenity was intended as either a "legislative drafting handbook" or as a "manual of jury instructions."

Although no other obscenity case of national significance is before the Court, more tests of the June 1973 guidelines are sure to come. In the meantime the justices have stabilized into a 5-3-1 pattern amid sharp complaints from the dissenting four that the Court has fashioned rules too vague to follow.

Justices Brennan, Stewart, and Marshall have contended that the Constitution forbids both state and federal governments from totally suppressing sexually oriented matter, but that distribution may be regulated. They also favor a ban on distribution to juveniles and "obstrusive" exposure to consenting adults. Justice Douglas holds that the First Amendment permits no hindrance of any kind to free speech.

The complaints about the effect of the June 1973 decisions came as the Court majority routinely processed obscenity cases still on its docket. In view of their 1973 declaration of obscenity rules the Court either remanded some cases for action in accord with their new views or let lower court decisions stand. The Court:

1. vacated the Nebraska Supreme Court judgment that an obscenity statuté was not unconstitutional for vagueness or failure to prescribe enforcement procedures. Knowledge of the obscenity was not required by the lower court to support conviction for knowingly circulating and publishing obscene movie film. Affirmative proof of community standards and proof of the obscene nature of the film had not be required. (Little Art Corp. v. Nebraska, 204 NW 2d 574.)

2. vacated the lower court judgment that under a Louisiana obscenity statute observation of only part of a film was sufficient to determine obscenity, expert evidence was not required, and an affidavit summarizing the film was sufficient to support a search warrant. (Gay Times, Inc. v. Louisiana, 42 LW 3261.)

3. vacated Alabama obscenity convictions which were affirmed without opinion. Questions presented to the Supreme Court pertained to the alleged violation of the First Amendment when state statutes are used to convict defendants who gave notice of the sexual nature of materials, protected juveniles from exposure, and did not force materials upon unwilling receivers; to the determination of obscenity in the absence of evidence of the elements of obscenity; and to the use of local rather than national community standards. (Trinkler v. Alabama, 42 LW 3022, 3235.)

4. vacated a lower court judgment which held that the government need not offer expert testimony establishing obscenity. (Groner v. U.S., 42 LW 3087.)

5. denied certiorari to a California Supreme Court case which held municipal and county ordinances did not restrain communication expression by prohibiting food and drink service combined with entertainment by topless and bottomless persons. (Reynolds v. City of Sacramento, 9 Cal 3d 405.)

6. has under consideration a Washington case which raises the question whether the First and Fourteenth Amendments are violated by holding that obscenity can be determined on the basis of pictures independent of surrounding textual materials. (J-R Distribution, Inc. v. Washington, 512 P 2d 1049.)

To the dismay of serious publishers and film makers several states, acting on invitation by the Court, have been rewriting their obscenity laws. Massachusetts now has a law that allows district attorneys to order arrests on pornography charges without a prior court ruling on whether the material was in fact obscene. Generally, however, contrary to the early fears of civil libertarians, the 1973 Miller cases and their strong anti-obscenity rulings have had little effect. Initial hasslings, raids, arrests, and prosecutions have passed and nothing much has happened since. Smutty publications are still being sold and X-rated movies abound. The onset of public

indifference may make the complex issues moot as the national mood points to Justice Douglas' preferences for the uncensored and Justice Brennan's insistance on the right of consenting adults to decide for themselves what expression they will tolerate. Unfortunately for both justices, however, neither will likely be around when this state of legal consciousness finally alligns the thinking of jurists with the realities of this thing "obscenity"--whatever it is.

Loyalty Oaths

Communist Party of Indiana v. Whitcomb, (42 LW 4129)

The appellants, the Communist Party of Indiana, applied for a place on the Indiana ballot for the 1972 general election. The application was rejected for failure to submit an oath stating that the Party does not advocate the overthrow of local, state, or national government by force or violence. The District Court on request of the Communist Party declared the statute unconstitutional and ordered the Election Board to place the Party on the ballot.

On appeal a Supreme Court majority held the loyalty oath requirement to be in violation of the First and Fourteenth Amendments. Free speech guarantees did not permit Indiana to proscribe advocacy except where such advocacy attempts to incite or produce imminent lawless action and is likely to produce such action. For purposes of granting access to the ballot, a group advocating violent overthrow as abstract doctrine was held not to be ipso facto advocating unlawful action. Appellees argument that state regulation of access to the ballot differed from other loyalty oath cases was rejected with the reasoning that "the right to associate with the political party of one's choice is an integral part" of protected First Amendment rights. In essence the Court rejected the Board's claim that "at least for purposes of determining whether to grant a place on the ballot, any group that advocates violent overthrow as abstract doctrine must be regarded as necessarily advocating unlawful action."

Justices Powell, Burger, Blackman, and Rehnquist concurred in the result but disagreed with the reasoning. Since both of the major parties were certified without submitting the required loyalty affidavits, these justices contended that discriminatory application of the Indiana statute to the Communist Party denied them equal protection under the Fourteenth Amendment. They did not view this as a First Amendment case.

Prisons

Procunier v. Martinez (42 LW 4603)

When prison inmates challenged mail censorship regulations which prohibited inmate correspondence that "unduly complained," "magnified grievances," "expressed inflamatory political, racial, religious or other views or beliefs," or contained matter deemed "defamatory" or "otherwise inappropriate," the District Court found this regulation violative of the First Amendment for allowing improper suppression of expression.

The Supreme Court affirmed the judgment of the District Court and held these regulations "invited prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship." The Court indicated that it could support prisoner mail censorship as a permissible restraint on otherwise First Amendment liberties providing certain criteria are met. First, an "important or substantial" governmental interest (security, order, or rehabilitation) unrelated to the suppression of expression must be furthered. Second, the effect on First Amendment freedoms must be no greater than is "necessary or essential" to protect the governmental interest involved.

Justices Douglas, Brennan, and Marshall joined in concurring that the First Amendment is foremost among the Bill of Rights for both state and federal prisoners. Douglas concluded that "prisoners are still 'persons' entitled to all constitutional rights except and unless their liberty has been constitutionally curtailed in the procedures that satisfy all of the requirements of due process."

Pell v. Procunier (42 LW 4998)

A manual for the California Department of Corrections prohibited newsgathering through interviews with inmates specifically designated by members of the press. This precaution was taken when violence resulted after face-to-face interviews resulted in some inmates receiving disproportionate notoriety and influence among their fellow inmates. The plaintiffs contended that "irrespective of what First Amendment liberties may or may not be retained by prison inmates, members of the press have a constitutional right to interview any inmate who is willing to speak with them" providing prison security or other substantial interests of the corrections system are not jeopardized.

The District Court held that the provision in the manual prohibiting face-to-face newsgathering from designated inmates by journalists violated the constitutional rights of inmates, but the

rights of the press were not violated because other means of communication were preserved.

On appeal by the prison officials and the journalists the Supreme Court reversed the finding for the inmates and upheld the District Court's dismissal of claims on behalf of the journalists.

The Supreme Court (Stewart, Burger, White, Blackman, Rehnquist, and Powell in part) held that any restriction on inmates free speech rights must be balanced against the legitimate interest of the state (deterance of crime, rehabilitative quarantining, internal security). Since alternative means of communication (mail, visitation rights) are open to inmates, their free speech rights have not been violated. The rights of the press are not infringed because they still retain access to information available to the general public, and the First Amendment does not guarantee the press a superior right of access.

Justice Douglas dissented and was joined by Brennan and Marshall in his claim that the state cannot "defend an overly broad restriction on expression by demonstrating that it has not eliminated expression completely." Douglas stressed that the inmates with the support of the District Court properly contended that the recognized necessity to limit media interviews is not justification for an absolute ban on such. Douglas found the only issue to be whether a complete ban on interviews with inmates selected by the press infringes on the public's right to know by exceeding that necessary to impose reasonable regulations to effectuate prison discipline and order.

Saxbe v. The Washington Post (42 LW 5006)

When the Federal Bureau of Prisons prohibited personal interviews between newsmen and individually designated inmates of federal prisons, this was held not to be an abridgement of the First Amendment "since it does not deny the press access to sources of information available to members of the general public but is merely a particularized application of the general rule that nobody may enter the prison and designate an inmate whom he would like to visit, unless the prospective visitor is a lawyer, clergyman, relative, or friend of that inmate."

Civil Rights

Lehman v. City of Shaker Heights (42 LW 5116)

Lehman, a politician, was refused advertising space on city transit system vehicles. Lehman challenged the constitutionality of a municipal policy which prohibited political but allowed other types of advertising. The Ohio Supreme Court held that Lehman's free speech and equal protection rights were not violated since a public transit system is not required to accept paid political advertising for display purposes.

The lower court judgment was affirmed on appeal. The Court majority concluded that card space on a city transit system vehicle is not a First Amendment forum. The city's discretion to display less controversial commercial and service-oriented advertising minimizes chances of abuse, appearances of political favoritism, and the risk of imposing views on a captive audience.

Justice Douglas found himself in the unaccustomed rule of concurring with Blackman, Burger, White, and Rehnquist but filed in a separate opinion the position that public transit vehicles are not a place for discussion and forced expression on a captive audience but only a means of transport.

Newspapers

The Miami Herald v. Tornillo (42 LW 5098)

The Miami Herald refused to print Tornillo's replies to editorials critical of his candidacy for the Florida House of Representatives. Tornillo brought suit under a Florida "right of reply" statute that grants a political candidate a right to equal space to answer criticism and attacks on his record by a newspaper. The Circuit Court declared the statute an unconstitutional infringement on a free press and dismissed the case. The Florida Supreme Court reversed the decision and remanded the case for further proceedings.

A unanimous Supreme Court held that the statute violated the First Amendment through government compulsion on a newspaper to publish that which it chooses not to publish. Justice Burger concluded: "Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forego publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. . . . The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials--whether fair or unfair--constitutes the exercise of editorial control and judgment."

Defamation

In late June a sharply divided Supreme Court in two lengthy, complicated, and circuitously reasoned cases reversed lower court defamation convictions.

Letter Carriers v. Austin (42 LW 5105)

Virginia libel laws were used to impose sizeable damages for public expression (of contempt for "scabs") during a heated organizational drive. The appellees' names were published in a "List of Scabs" together with a definition of a "scab" as a "traitor." The trial court interpreted Linn v. Plant Guard Workers 383 U.S. 53 to allow damages providing the challenged statements were made with "actual malice" defined as "actuated by some sinister or corrupt motive such as hatred, personal spite, will, or desire to injure. . . with such gross indifference and recklessness as to amount to a wonton or willful disregard" of personal rights.

Justice Marshall, who delivered the opinion of the Court, noted that the Linn case held that federal law pre-empts state law when the state seeks to penalize statements in labor disputes published without knowledge of their falsity or reckless disregard of the truth. Consequently the lower court both misunderstood Linn and failed to offer protection to expression in labor disputes as recognized in Linn. The use of the epithet "scab" was literally and factually true, common parlance in labor disputes, and protected under federal law. The use of "traitor" was not to be construed as fact since it was used in a figurative sense to announce strong disagreement with workers opposing unionization.

Justice Powell was joined in dissent by Justices Burger and Rehnquist. He contended that the publication clearly claimed that appellees lacked character, had "rotten principles, and were traitors to God, country, family, and friends." Powell was distressed that "appellant makes no attempt to prove the truth of his accusations, contending instead that they were mere hyperbole involving no statement of fact." The majority was in error, according to Powell, because "the union did not merely voice its opinion of 'scabs' generally, it identified these appellees by name and specifically impuned their character."

Gertz v. Welch (42 LW 5123)

Gertz, a reputable attorney, was retained by the family of a youth who had been shot and killed by a Chicago policeman. The policeman had been convicted of murder, and Gertz represented the family in civil litigation against him. Welch, publisher of John Birch Society views, warned of nationwide efforts to discredit local law enforcement agencies, published material identifying Gertz as a "Communist-frontier," and implied criminal conduct. Although the accusations contained serious inaccuracies, the District Court decided that the New York Times v. Sullivan, 376 U.S. 254, standard, which bars media liability for defamation of a public official unless there is malice, should apply here. The Court contended that the New York Times result protects media presentation of public issues without regard for whether the

person defamed is a public official. Since Gertz failed to prove Welch's knowledge of the falsity or reckless disregard for the truth, judgment was entered for Welch. The Court of Appeals affirmed.

The Supreme Court reversed and remanded the case. The principle issue was whether media publication of defamatory falsehoods about individuals who are neither public officials nor public figures receive a constitutional privilege against liability for damage inflicted by the falsehoods? The Court answered "no" to this question holding that New York Times does not protect from liability those who defame merely because the statements concern an issue of public interest. The Court reasoned that private individuals are more vulnerable to injury from defamation because they have less opportunity to reply, and they are more deserving of recovery because they have not voluntarily exposed themselves to the risks of defamation. The state interest in compensating injury to the reputation of private individuals was held to be greater than for public officials and public figures.

Gertz was found to be neither a public official nor a public figure, and the New York Times standard which did not extend to private individuals was therefore not a defense available to Welch.

The outer boundary of the New York Times doctrine was established with the position that "a State is free to define for itself the appropriate standard of a media's liability so long as it does not impose liability without fault."

III. Docketed: Other Cases

Disposed

In each of the cases reported below the Supreme Court took action which resulted in allowing the holding of the lower court to prevail.

Civil Rights

Ruling below: The refusal to allow the Indiana Civil Liberties Union to use an auditorium which had been available for almost any public purpose was a denial of equal protection under the Indiana Constitution. Issues: Was there denial of equal protection? May the Indiana Supreme Court ignore federal constitutional questions and resolve said questions on state constitutional grounds thereby precluding U.S. Supreme Court review? (Certiorari denied, Indiana War Memorials Commission v. Indiana Civil Liberties Union, Inc. 291 NE 2d 888.)

Attorneys

Ruling below: The solicitation of business by an attorney in a public corridor adjacent to a county municipal court is unethical and justifies his suspension from law practice. Issue: Do the Cannons of Ethics as applied in this case violate the First Amendment by infringing on the attorney's freedom of speech and right of association? (Certiorari denied. Perrello v. Disciplinary Commission of Indiana Supreme Court. 42 LW 3102.)

Housing

Ruling below: The antiblockbusting provision of the 1968 Fair Housing Act is a lawful regulation of commercial activity and not an unconstitutional prior restraint on speech when it allows prohibition of all "badges and incidents of slavery." Issue: Is the provision an unlawful prior restraint on free speech, and was the appellant guilty of group behavior even though not connected with any member of the group? (Certiorari denied. Bob Lawrence Realty, Inc. v. U.S. 474 F 2d 115.)

Demonstrators

Ruling below: Defendants who refused to obey a prohibitory restraining order preventing them from marching were lawfully held in violation of the court order. The claim that the judge's order was not served on the would-be-marchers was not a recognized defense to the willful disobedience of the order. Issue: Is the First Amendment violated by protest marchers' summary conviction for contempt of a prohibitory restraining order when the order is entered two hours before the march and allegedly not communicated adequately to the protestors? (Certiorari denied. Sumbry v. Land. 195 SE 2d 228.)

Disorderly Conduct

Ruling below: A Tennessee statute making it unlawful to "willfully disturb or disquiet any assemblage of persons met for religious worship . ... by noise, profane discourse, rude or indecent behavior, or any other acts, at or near the place of meeting" is neither vague nor does it stifle freedom of speech. Issue: Is a statute which makes it unlawful to disturb a religious assembly in violation of the First Amendment? (Certiorari denied. Reynolds v. Tennessee. 42 LW 3355.)

Newspapers

Ruling below: Refusal to disclose to newspaper reporters the names of public assistance recipients does not violate the First Amendment right of reporters to gather news. Issue: Under Pennsylvania law does a person on public assistance have a right to an anonymity which is superior to the First Amendment right of the press to gather news as a public representative? (Appeal dismissed. McMullan v. Whalgemuth. 308 A 2d 888.)

Libel

Ruling below: A complaint against a newspaper publisher who was charged with libel but without actual malice was properly dismissed under the New York Times rule, 376 U.S. 254. Issue: Can publication of a libelous statement anonymously uttered outside legal or quasi-legal proceedings be considered as privileged under the Constitution and therefore protected expression when printed? (Certiorari denied. Cota v. Chandler. 42 LW 3158.)

Pending

In each of the cases reported below the case has either been argued before the Supreme Court and no written opinion has yet been rendered or the Court has yet to hear the case or otherwise dispose of it.

Newspapers

Ruling below: The First Amendment was not violated by a Virginia statute which enabled the conviction of a newspaper editor who published an advertisement about abortion services. Issue: Does a statute which prohibits persons "by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner" from encouraging or prompting abortion infringe on protected expression? (Bigelow v. Virginia, 200 SE 2d 680.)

Right to Privacy

Ruling below: A conversation with a workman cleaning tiolets at the Woodstock Festival and filmed for commercial viewing did not entitle First Amendment protection as a bar to an invasion of privacy suit unless the workman was a participant in a newsworthy event. Issue: Does the First Amendment bar suit for invasion of privacy when a person's conversation is filmed for commercial purposes and the film portrays an event of admitted public interest? (Wadleigh-Maurice, Ltd. v. Taggart. 42 LW 3531.)

Publications

Issue: Does the prohibition of distribution and sale of a truthful, nonobscene book about the case history of a psychiatrist's former patient and family constitute impermissible restraint upon freedom of the press? (Roe v. Doe, 42 LW 3597.)

Ruling below: A municipal ordinance prohibiting sale of goods except for newspapers or other printed news periodicals was held unconstitutionally overbroad when applied to the defendant who was selling maps that provided addresses and directions to homes of movie stars. Issue: Are printed materials sold for profit and not for disseminating information, ideas, opinions, views, or beliefs protected expression under the First Amendment? (California v. Welton. 42 LW 3632.)

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Gertz v. Robert Welch, Inc., 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Private individual may recover actual damages for libel based on negligence; punative damages for libel upon proof of actual malice.

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NLRB v. Magnavox Company, 94 S.Ct. 1099, 39 L.Ed.2d 358 (1974). Rights of employees under the National Labor Relations Act to form, join or assist labor organizations, which might be subjected to interference by employer's rule prohibiting employees from distributing literature on its property, cannot be waived by employees collective bargaining representative.

Norwell v. City of Cincinnati, Ohio, 414 U.S. 14, 94 S.Ct. 187, 38 L.Ed.2d 170 (1973). Ordinance which prohibits a person from willfully conducting himself in a noisy, boisterous, rude, insulting, or other disorderly manner, with intent to abuse or annoy another was applied in manner violating the right of speech of defendant who verbally protested treatment without abusive language or fighting words.

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Plummer v. City of Columbus, Ohio, 414 U.S. 2, 94 S.Ct. 17, 38 L.Ed.2d 3 (1973). City code providing that "no person shall abuse another by using menacing, insulting, slanderous, or profane language" held to be facially unconstitutional as being vague and overbroad since it was susceptible of application to protected expression.

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